

Current Themes
in the
1999 CONSTITUTION

A Tribute
to
Hon. Justice S.M.A Belgore

edited by

D. A. Guobadia
Epiphany Azinge



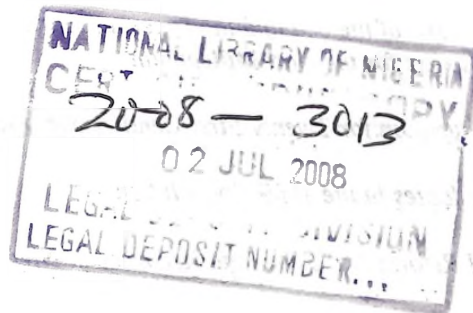
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*(Retired Chief Justice of Nigeria and former Chairman, Governing
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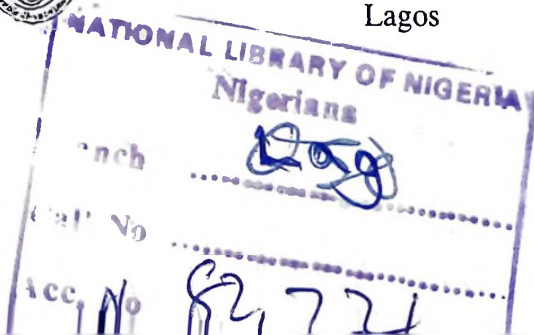
and

Professor Epiphany Azinge, SAN
(Director of Studies, Nigerian Institute of
Advanced Legal Studies)



2007

Nigerian Institute of Advanced Legal Studies
Lagos



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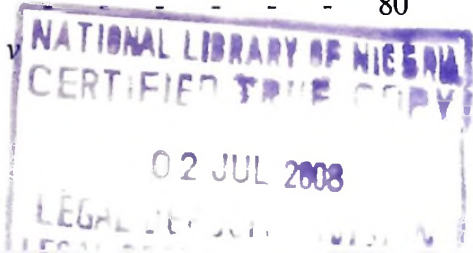
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Foreword

This book, *Current Themes in the 1999 Constitution* is the result of painstaking work by a collection of intellectuals who constitute the think tank of academia. The topics discussed have been carefully selected to aggregate views on the Constitution in action. It is not a “what are the provisions” in the Constitution but a “how have the provisions of the Constitution been constructed” in practice.

The spate of impeachments and how they have been handled both by the Legislature and the Judiciary is one of the very current issues. Its discussion raised a number of other very pertinent issues like, what is immunity? Why has there been so much emphasis only on executive immunity? What is the realism of the partnership between the top Executives? Is there anything like a “divided” government? Who decides what a divided government is? What strategies can the Constitution provide to forestall a “divided government?”

The issue of tenure of government is also a critical one. Why was tenure not a problem until recently? Under this topic, other issues arising include how and when elected officers can be deemed to have assumed or vacated office.

These questions which would have been thought to be merely political, theoretical and academic have proven to be latent issues which have required judicial interpretation. So, should there be a Constitutional Court to take constitutional issues out of the main stream of adjudication in our present structure of courts? Has the political undertone to many of these issues brought the Judiciary too much into the political terrain? I have merely touched on a very few issues of interest contained in the Chapters of the book under various headings.

The process of producing the book is itself an exercise in intellectualism. Usually, when eminent professors write articles, they do not need to subject them to peer review. But all the Chapters in this book have been subjected to extensive peer review through a process of an “open roundtable” to which other eminent professors and colleagues from disciplines other than

law were invited. The outcome is a very rich compendium of constitutional issues put in the context of contemporary history. It thus becomes a book, not only for constitutional lawyers but also for political scientists and historians.

The succeeding political administrators will do well to obtain copies of the book for thorough study. They will find very useful suggestions for the performance of their duties and responsibilities and thereby avoid some of the pitfalls of the previous Administration. Of course, constitutional reform is recommended, but with a *caveat*, that such amendments should be for the purpose of reducing the frustrations which are obvious and which oftentimes lead to or result in obviously illegal practices.

The book is a must for any library, public or private, of any one interested in good governance. I congratulate the Director-General of the Institute and her team for such an excellent contribution to legal literature.

Professor Jadesola Akande OFR, FNIALS
Professor of Law.

February 2007.

Preface

When the Constitution of the Federal Republic of Nigeria 1999 was promulgated, the Nigerian Institute of Advanced Legal Studies undertook a major examination of the key features of the Constitution in the book aptly titled *Nigeria: Issues in the 1999 Constitution*.

The Constitution was heralding a new civilian Administration and the critical examination of the contents largely recognized the need to have it tested over time. Eight years into the operation of the Constitution, even the casual observer of the process of governance and the dynamics of the political process cannot but agree that lot has happened since. How effectively have the principles of the Constitution shaped the actions of government? How well have the expectations of the populace of their elected representatives been met within the context of their constitutional responsibilities? To what extent has the notion of governance by pre-determined rules and consequently, checks and balances as well as other fundamental assumptions of the Constitution been imbibed by the players? The questions are myriad. Indeed several provisions of the Constitution have been the subject of litigation. As has been pointed out by many, the Judiciary has risen to the challenge of judicial review in its interpretative function.

Eight years into the operation of our Constitution, the Institute has, in line with its mandate as a research Institute, once more taken up the challenge of assessing the Constitution - this time, in its actual workings. This is a logical progression from the earlier publication *Nigeria: Issues in the 1999 Constitution*. There is a deliberate effort in this latest work to avoid the tedium of a book of readings that merely follows the beaten track i.e. an examination of traditional concepts in Constitutional Law.

We acknowledge the depth of analyses of each of the contributions. The roundtable that preceded the final publication of this book was chaired by Professor J. O. Akande. Participants benefited greatly from her wealth of experience as a scholar in the field of Constitutional Law. She also graciously

wrote the Foreword to the book. The Institute Library prepared the Index at very short notice. Mr. Peter Akper, Senior Research Fellow, Mrs. Janet Asagh and Mrs. Kehinde Ikhimiukor, both Research Fellows in the Institute, painstakingly proofread and effected the corrections made in the process of editing the manuscripts. The Institute Press produced the final copy.

This book is a **tribute** to the Honourable Justice S. M. A. Belgore, GCON, FNIALS, immediate past Chief Justice of Nigeria who for many years was Chairman of the Institute's Governing Council. He served with untiring energy and unalloyed commitment to the progress of NIALS. It is fitting that his Lordship should be so honoured. Despite the odds that time imposed, in his rather short tenure as Chief Justice of Nigeria, The Belgore Court (the Supreme Court that he headed) made its mark and left a fundamental legacy in constitutional cases. That Court similarly gave off the posture of an Institution committed to speedy dispensation of justice. Its response to the challenges posed and the potential for crisis in the matter of the removal of the Governor of Oyo State for example, seems to have stemmed the tide of the reckless gale of impeachment and removal of Chief Executives that was blowing across the nation.

These judgments will not only give scholars and practitioners of Constitutional Law ample scope for the development of our jurisprudence, for those who have an abiding interest in the political process, they will be veritable guides for the future.

The Institute congratulates the Honourable Justice S. M. A. Belgore on the successful completion of his judicial career and wishes him every happiness in the years ahead.

Professor D. A. Guobadia
Director-General

February 2007.

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Abbreviations and Acronyms

AD:	Alliance for Democracy
A.G:	Action Group
A.G:	Attorney-General
ANPP:	All Nigerian Peoples Party
APP:	All People's Party
C.A:	Court of Appeal
CAN:	Christian Association of Nigeria
CPA:	Criminal Procedure Act
CPC:	Criminal Procedure Code
CFRN:	Constitution of the Federal Republic of Nigeria
CMS:	Church Missionary Society
EFCC:	Economic and Financial Crimes Commission
JCA:	Justice of the Court of Appeal
JNI:	Jama'atu Nasril Islam
JSC:	Justice of the Supreme Court
LASTMA:	Lagos State Traffic Management Agency
LEEDS:	Local Economic Empowerment and Development Strategy
LFN:	Laws of the Federation of Nigeria
MPLA:	Movement for the Liberation of Angola
NAI:	National Archives Ibadan
NASS:	National Assembly
NCLR:	Nigerian Criminal Law Reports; Nigerian Commercial Law Reports
NCNC:	National Convention of Nigeria Citizens
NCP:	National Conscience Party
NDDC:	Niger Delta Development Commission
NEEDS:	National Economic Empowerment and Development Strategy
NEPU:	Northern Elements Progressive Union
NIALS:	Nigerian Institute of Advanced Legal Studies
NJC:	National Judicial Council
NNA:	Nigerian National Alliance
NNDP:	Nigerian National Democratic Party
NNPC:	Nigerian National Petroleum Corporation

NPC:	Northern People's Congress
NPN:	National Party of Nigeria
NPP:	Nigerian People's Party
NSCC:	Nigeria Supreme Court Cases
NWLR:	Nigerian Weekly Law Reports
OPC:	Odua People's Congress
PDP:	People's Democratic Party
PPERA:	Political Parties Election and Referendum Act
PRP:	People's Redemption Party
PTDF:	Petroleum Trust Development Fund
SAN:	Senior Advocate of Nigeria
SAP:	Structural Adjustment Programme
S.C:	Supreme Court
SCNLR:	Supreme Court of Nigeria Law Report
SEEDS:	State Economic Empowerment and Development Strategy
SIM:	Sudan Interior Mission
SUM:	Sudan United Mission
UNGA:	United Nations General Assembly
UPGA:	United Progressives Grand Alliance
US:	United States

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GENERAL INTRODUCTION

GENERAL INTRODUCTION

I

OF MATRICES AND TRANSFORMATION: THE 1999 CONSTITUTION IN AN ERA OF CHANGE

by

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Introduction

Change and transformation in the context of a Constitution suggest a State's process of moving from one point or stage to a projected end. The very nature of Constitutions *vis à vis* governance implies that the transformation contemplated is deliberate and gradual. Within the broad theme of this Chapter, the process of transformation refers to steps taken towards attaining the goal of governance in accordance with the Constitution. The story of Nigeria's transition from military dictatorship culminating in civil government in 1999 has been well documented elsewhere by several writers. It bears no repeating here, for succeeding administrations have tended to write their own accounts for posterity.¹

A few fundamental historical facts must, however, be alluded to as a prelude to the ensuing discussion. First, it must be recalled that the military have held the reins of government for a much longer period, in the aggregate, than elected civilians in the 47 year post independence history of Nigeria. Civilians have been in governance for approximately 17 years in all, a period interrupted three times by the military. The period 1999 to date

1. See for example, Sam Oyovbaire and Tunji Olagunju (eds-) *Foundations of a New Nigeria the IBB Era*-Precision Press; Olagunju, Jinadu and Oyovbaire-*Transition to Democracy in Nigeria* (1985 -1993) – Safari Books UK in association with Spectrum Books Ltd (1993); But see also from a different perspective, Larry Diamond, A. KirkGreene, Oyeleye Oyediran (eds): *Transition without End* – Vantage Publishers, Ibadan 1997.

has been the longest so far of uninterrupted Civil rule. It is therefore axiomatic that the aforementioned process of transformation will, for now, be shaky at best – being still in its earliest stages.

The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999² declared clearly that the Constitution which it gave the force of Law³ was essentially a rehash of the Constitution of 1979⁴ which, after necessary amendments, was “promulgated into a new Constitution with effect from the 29th May 1999.” It will be recalled that the 1979 Constitution re-introduced an executive Presidential System of government which was also adopted in the 1999 Constitution. The Presidential System was a clear departure from the Parliamentary System of government that had been in operation in the immediate post-Independence period.⁵ The choice of an executive presidential system was a response to the problems that were encountered in the dichotomy between the ceremonial Head of State (President) and the Head of government (The Prime Minister) under the Parliamentary System. Alluding to this, the *Political Bureau*,⁶ in supporting the choice of the Presidential System, observed that its hallmarks were “its merit of unity, energy and despatch.”⁷ The Bureau also warned of the flaws in such a system i.e. “the dangers of dictatorship in a single presidential executive.” This is why the whole notion of checks

2. No 24 of 5th May 1999.
3. The Constitution of the Federal Republic of Nigeria 1999 (hereinafter called the 1999 Constitution).
4. i.e the Constitution of the Federal Republic of Nigeria 1979 (hereinafter, the 1979 Constitution).
5. See the Independence Constitution of 1960 and the Republican Constitution of 1963.
6. Set up by the Military government of General Ibrahim Babangida to conduct a national debate on the political future of the country. See the letter of the Chairman of the Bureau, Dr. S. J. Cookey forwarding the Report of the Bureau to the President – in the *Report of the Political Bureau*, Federal Government Printers, March 1987.
7. See the *Report of the Political Bureau*, March 1987, Federal Government Printer, page 73.

—d balances, the underlying philosophy for Separation of
—owers in the 1999 Constitution is designed to check this
—tentential for abuse of power.

In its commentary on the experience of governance in the
—cond Republic under the 1979 Constitution, the Political
—ureau did observe that:

“... Constitutional engineering alone is not the
answer to these problems.... only a politically
conscious society that is aware and jealous of its
right to choose those who direct public affairs is
capable of stopping such abuses...”⁸

The underlying theme here is that good governance,
premised on these aforementioned ideals and built on the
framework of a written Constitution to which the concept of
limited government is pivotal, is the presumed purpose of elected
and other officials of the state.

How then have these features and the allied assumptions
played out in:

- (a) the eight year history of the 1999 Constitution and
- (b) the ongoing process of transformation to the ideals of
Constitutionalism?

These and many more questions are the concern of this book
which takes a critical look at the 1999 Constitution in operation.
The book dwells, in the main, on three broad themes namely:

- (a) the philosophy and structure of government;
- (b) the political arms of government; and
- (c) the electoral process.

Within each of these themes which also anchor the fundamental doctrines of Constitutional law and more, several issues that have arisen in the course of operating the 1999 Constitution and civil government are critically examined.

The approach adopted provides a basis for value judgments on the efficacy of the said Constitution. By highlighting some of the issues discussed by the contributors and raising others germane to these themes, this introductory Chapter attempts to present the issues within the context of transformation to the ideals of constitutionalism. Some fundamental questions are consequently raised as to the way forward and the prospects for required changes in the Constitution.

The Philosophy and Structure of Government

Two issues, religion and the operation of the federal system that have dominated the national scene and brought a lot of tension are dealt with under the broad heading of the philosophy and structure of government. On the first issue, the Constitutional prohibition of the adoption of a state religion⁹ pronounces with certain clarity, the secularism of the Nigerian State. In spite of this however, the system continues to grapple with the contradictions implied in the alleged violation of this prohibition by the introduction of Sharia in some States. Proponents of secularism also say that by stating clearly that there shall be no State religion, the Constitution affirms a policy of non-involvement by government in matters of religion. This thus calls to question, government funding of pilgrimages (Christian and Moslem) which in another sense can be seen as violating the constitutional guarantee of freedom from discrimination.¹⁰ Interestingly, there does exist a view that government participation in these pilgrimages is evidence of non-discrimination. This proposition is largely untenable as there are several other world views and religions operating in Nigeria. To

9. Section 10 of the 1999 Constitution.

10. Section 42 of the 1999 Constitution.

the extent that adherents of such world views and faiths are not similarly funded, it can be asserted that it is discriminatory. A more acceptable position perhaps, is for government to steer clear of the matter of religion altogether, - pilgrimages and all!

A scholarly contribution from a highly cerebral member of the clergy examines the concept of secularism and the Nigerian State and provides a background for the legal and sociological examination of the approach of the Constitution to the issue of religion in Chapters 3 and 4.

In some of the existing literature and certainly in popular discourse, the controversy over religion and secularism in Nigeria has tended to dwell on the issue of sharia and its adoption by some state governments often losing sight of other relevant matters. Two examples will suffice. The issue of whether the state and its apparatus such as hospitals can or should interfere to compel particular forms of treatment that go against a patient's religion and preferences in the effort to save life. Here, state action may be propelled by an overriding interest of society in preserving the life of a nursing mother in order to have her live to look after her infant children.

The second example is the issue of legalising same sex marriages which has been the subject of debate in several jurisdictions of the world. Much of the opposition that has been expressed against it in Nigeria and elsewhere has religious undertones as shown in Chapter 3.¹¹

The perennial conflict between centrifugal and centripetal forces in many plural societies that have opted for federalism as a form of government often results in tension of varying proportions. This has been the subject of a vast array of literature. The many and diverse ethnic groups within the Nigerian State have added the dimension of ethnicity to the problem. This is particularly glaring in the Niger Delta where the

11. For an illuminating perspective, see Nwogugu E. I. *What Next in Nigerian Family Law?* 2006 Founders' Day Lecture of the Nigerian Institute of Advanced Legal Studies. NIALS Press 2006.

demand for "more" in the scheme of things and access to control of resources has led to increased violence, hostage taking and disruption of the activities of the oil industry – the mainstay of the country's economy. These conflicts are traceable in many respects to dissatisfaction by different groups within the geopolitical configuration with the distribution of power particularly, control over natural and fiscal resources within the federal structure. The balance of power is said to be too heavily tilted in favour of the central government.

In this continued agitation, the communities of the Niger Delta set store on the fundamental issue of fiscal federalism which is perhaps one of the most knotty issues in the continuing debate on the Constitution. It is so easy to take the matter of their agitation in isolation and condemn it as criminal, particularly in the light of the methods adopted. Located within the purview of the Constitution however, it presents a different picture. It at once reflects dissatisfaction with the technique or formula for allocation and sharing of revenue, the principles guiding control of resources in a federal system and even the basis of association by the federating units. The Chapter on federalism and ethnicity examines these issues from a conceptual point of view and provides ample background for continuing discourse with a view to finding a solution to identified problems. This Chapter locates the genesis of this skewed federal structure in the military adventure in governance in the aftermath of the civil war (1967 – 1970) and the effort to bring a certain cohesion into what had become a very fractured nation. The military made mileage out of this and against the background of its own centralised structure, managed to nurture a system in which the federal government was and remains rather dominant.

The roots and dimensions of the defects in our federal system lie deep. They account in many respects for some of the recurring problems in the polity. One of these is what is regarded by some as the contradiction in the structure and control of the Police which is regarded by many as antithetical to the federal

arrangement. The issues are articulated in the discussion on re-engineering the structure and control of the Nigeria Police in Chapter 11. The second issue is the fiscal policy relating to the distribution and sharing of revenue. It is also reflected in the ongoing controversy over the creation and funding of local governments in some states of the federation to which some reference will be made later.

Chapter 5 shows, for example, that in relation to division of powers under the federal structure, there is a shift in emphasis from the issue of division of powers which is taken as given, to how such powers are shared. The fundamental question is whether the balance is right between the levels of government. This continues to point at a need for negotiation or reconsideration of the basis for coming together or indeed remaining together as a people. This issue also features in the discussion on federalism and ethnicity.

The issue of local government creation and the constitutional conflict it has generated in the operations of the 1999 Constitution have shown that whereas the Constitution provides for creation of new local governments and provides a procedure by which the states can undertake same, the fact that no state has been able to complete the process under the Constitution is a sign of failure or undue rigidity perhaps or indeed both. Surely the framers of the Constitution did not intend to stifle the process or did they? If they did then the wordings should have clearly said so. If they did not, it has since become clear that something must be done to enable the actualisation of local government creation. This is a fundamental matter relating to the structure of government in which the Constitution recognises a third tier. Under a Constitution in which the revenue allocation formula is also tied to States and local government spread, it is a contradiction in terms that States cannot, *de facto*, create local governments. The issue is proving to be a recipe for chaos. Together with the management of our federalism and ethnicity,

the emerging issues in local government remain key in the structure of governance.

Should the Constitution therefore be altered to make for a more federal union i.e. greater decentralization of power? In an earlier piece,¹² the point was made that all federal systems recognize the need for a strong central government. This can hardly be disputed. An overwhelming central government is however a different issue altogether. This has been said to lie at the root of what has been termed the "national question" and other problems that currently beset the nation.

A lot of the controversy which the operation of the Constitution has generated points at the fundamental role of the judiciary in the transformation to Constitutionalism. The fact that the judiciary has largely risen up to the challenges which operating a new Constitution has posed cannot be denied. The different landmark decisions recorded, particularly by the Supreme Court, in the interpretation of the Constitution in the last 8 years certainly bear witness to this fact. Some of them have been discussed in this book.

On the negative side however, the operation of the 1999 Constitution and some of the scandals associated with some individual Judges, their judgments and what may be termed, questionable motives, have raised questions about the underlying policy considerations that come to play in the appointment of Judges. How, for example, could the system operate in such a way as to allow for two Chief Judges in whatever circumstances, to exist in a State at any one time as recorded in Ekiti State sometime in 2006? What kind of reasoning, learning, ignorance or recklessness could propel any judge at first instance, to attempt to take on, as it were, a judgment of the Supreme Court? It will be recalled that in the matter of the dispute over the authentic Speaker of the Oyo State House of Assembly, it was

12. See Guobadia D.A. "Ethnicity and National Integration" in Guobadia D. A. and Adekunle A. O. (eds) *Ethnicity and National Integration in Nigeria: Recurrent Themes* NIALS 2004 pp. 20-37.

widely reported in the print and electronic media that a Judge of the High Court of Oyo State, in spite of the Supreme Court decision nullifying the removal of the State Governor, ordered that the status quo be maintained – in other words, that the decision of the Supreme Court should not be given effect.

The procedure set out in the 1999 Constitution for the appointment of Judges, cannot be faulted. The Constitution prescribes 10 years post qualification experience for appointment to the High Court. An appointee to the Court of Appeal must have been qualified to practice as a legal practitioner in Nigeria for not less than twelve years.¹³ Persons to be appointed to the Supreme Court require fifteen years post qualification experience. The problem does not therefore lie in the Constitutional provisions. It lies rather in the policy undertones that come into play in the appointment of judges, particularly to the Court of Appeal and the Supreme Court. These undertones have been manifest in the appointments that have consistently been made in the last decade or more.

Presently, it is too much of a closed shop¹⁴ that is beginning to operate like a civil service career projection. This is not in the best interest of the country or even the judiciary as an institution. There must be sufficient room for the injection of very fertile minds, the very best from the practicing Bar into the judiciary at every level. Similarly, there ought to be room for appointing competent persons from the academia into the appellate Courts. At that level, matters of procedure have largely been settled and the emphasis is on developing the jurisprudence, the issues of law. The infusion of academics will do the system a world of good. The contributions of scholars to the jurisprudence of the American Courts, as typified by the judgments and writings of

13. Section 238(2).

14. Of State Counsel; magistrates and a few practicing lawyers being appointed to the High Court except for the unusual exercise undertaken in Lagos a few years ago when the net was cast somewhat wide. Appointments to the Appeal Court, have been the exclusive preserve of High Court judges while all appointments to the Supreme Court have been only from the Court of Appeal.

Felix Frankfurter cannot be discounted, even in these times. The right mix of different backgrounds in judicial appointments at the appellate level (i.e. members of the practicing Bar, state Counsel and the academia) will give our jurisprudence the stimulus for unhindered growth and purposeful development.

There remains a more fundamental matter however. This lies in the fact that some of the constitutional issues that have arisen for consideration point at the need for another look at the forum for deciding constitutional cases as well as the general approach to constitutional interpretation. It has since become clear that puerile interpretation (for want of a better word), of constitutional provisions devoid of attention to the societal issues the provisions are meant to regulate, has not served the system well. The aftermath of the resource control case¹⁵ and even the case between Lagos State and the Federal Government, arising from the creation of local government councils in Lagos State and the release of appropriated sums to the Lagos State government are good examples.¹⁶ In the matter of resource control for example, the "victory" of the plaintiffs as it were, in the Supreme Court did not resolve the controversy and conflict over fiscal policy.

It has similarly been demonstrated that legalistic approaches to resolving constitutional disputes might not be the answer. It will be recalled that a lot of negotiation has had to go on between the Federal government and the oil producing States in the bid to arrive at an amicable solution to the problem. Do these facts then provide sound basis for a reconsideration of the case for a Constitutional Court in Nigeria?

The attempt at introducing one after the 1995 Constitutional Conference failed. The antagonism towards the novel idea was based largely on a misunderstanding of its role. The arguments in its favour rest on the very nature of a Constitution itself and consequently, the preferred approach to its interpretation. The

15. *A.G. Federation v. A.G. Abia State and Ors.* (2002) 6NWLR (pt. 764).

16. *A. G. Lagos State v. A.G. Federation* (2004) 18 NWLR (Pt 904)1.

Constitution requires interpretation to breathe life into it. Such interpretation as is appropriate does not require a purely legalistic approach. A Constitutional Court will look at the thorny philosophical and sociological underpinnings of the law. It is not to be legalistic in the way that the regular courts of the land are bound by legalistic considerations. Indeed, unlike the regular Courts which can only pronounce on disputes that have "ripened," a Constitutional Court can take on an issue for interpretation before a contest has arisen thereon. This can serve to diffuse matters before they ever have to go to the Supreme Court.

One question that has often arisen in relation to the case for the establishment of a Constitutional Court is how to determine what amounts to a constitutional issue since most cases will cut across many aspects of law. The South African approach to this is that a Constitutional matter is what the Constitutional Court declares to be such. This is a practical approach because it cuts out debate on the issue. It also recognises the fact that the province cannot otherwise be fully determined.

A Constitutional Court should not only be composed of Lawyers. People from other disciplines – such as the Social Sciences can be included. The model of a Constitutional Court described here should also serve to ensure that matters termed unduly political can be taken outside the regular Courts which can then be saved the problem of being mired in politics.

Beyond the conceptual issues dealt with in chapter 4, something must be said about the judiciary within the federal system. The National Judicial Council (NJC) established by the 1999 Constitution is contradictory to the federal structure. Its merits lie in the standards it has set and upheld for discipline in the judiciary.¹⁷ However, within the context of a federal system,

17. For a discussion of these issues, see Ademola Popoola "Institutional Reforms in the Nigerian Judiciary" in Guobadia D. A. and Adekunle A. (eds): *The Uwaia Court: The Supreme Court and the Challenge of Legal Development* (1995-2006) NIALS 2006 pp. 405-453.

much of the argument against the centralization of the Police force applies to that institution.

The 1999 Constitution empowers a State Governor to appoint the Chief Judge of the State "on the recommendation of the National Judicial Council (NJC) subject to confirmation by the State House of Assembly."¹⁸ Confirmation by the State legislature is not required in the case of other judges.¹⁹ These Constitutional provisions on appointment of judges to the State High Courts run against the grain of federalism. Why should a federal body (representation by States on it notwithstanding), exercise such power over the States? In addition, the composition of the NJC places too much power in one single individual. Apart from the judicial officers whose offices are specifically included in the composition, the Chief Justice of Nigeria is solely responsible for appointing 14 out of the 23 members. Five others are to be appointed by him on the recommendation of the Bar Association.²⁰ A body that has such enormous powers over the appointment and discipline of judicial officers can benefit from inputs from other sources in the matter of its composition.

The Electoral Process

With the 2007 general elections in view, a lot of issues have arisen in relation to the electoral process. Part III of the Book focuses on some of them which have taken centre stage in the course of operating the 1999 Constitution. It is right indeed to re-evaluate these factors with a view to avoiding the untidy scenarios that are currently playing out. Only a few issues need to be touched on here. On the tenure of elected Chief Executives, the saga of Governor Obi's removal from office soon after he reclaimed a mandate (which the Court ruled had been illegally denied him) may have saved the system from what could indeed have become a Constitutional crisis. Given Governor Obi's

18. Section 271(1) 1999 Constitution.

19. Section 27(2) 1999 Constitution.

20. See para 13, Third Schedule Part I 1999 Constitution.

circumstances, when could it be correctly said that his tenure as Governor of Anambra state began and consequently when would it have ended given the time at which he *de facto* assumed office? In spite of the respite momentarily given by his removal,²¹ this issue will have to be revisited. More importantly, the experience of Obi underscores the need to establish a credible time limit for the conclusion of election petitions. If such a time limit is to be of any utility, it must be before the candidate's tenure begins.

It has since become clear that due cognizance must be taken of the provisions on the tenure of elected officers. The philosophical foundations of the Constitutional provisions on tenure must be reassessed if only to be certain about what the nation needs. The very heated debate on tenure that occurred within the last year – which did in fact mar the proceedings of the Constitutional Conference (2005) showed that there are issues yet to be addressed by the polity in this regard.

The Political Arms of Government

In an interesting piece on the theme “Forestalling Divided Government” written from the perspective of the United States, James L. Sundquist²² examines the levels and species of such antagonism that lead to divided government. Demonstrating clearly that this division occurs across party lines as when the party in control of the executive is different from the one in control of either or both Houses of the legislature, Sundquist gives some suggestions for avoiding the phenomenon. These include the team ticket by which all the candidates for elective offices from one party i.e. in both the legislature and the executive are lumped together on one ticket so that a vote for one is a vote for all. Another suggestion is the idea of providing a limited number of bonus seats in the legislature for the party of a

21. Which is now being challenged in Court.

22. In *Constitutional Reform and Effective Government*: The Brookings Institution Washington DC 1986 Chapter 4. According to him, “an electoral verdict on the conduct of a divided government is perforce a muddy and a muddled mandate.” Page 78.

President-elect in order to "give it (sufficient) control of the Senate and the House."²³ This implies also that Presidential elections are held before others.

The arguments against these suggestions, which the writer also points out, are first, that the concept of the team ticket which he proposes would "destroy the voters' freedom of choice" while the idea of bonus seats would lead to "packing the Congress."²⁴ Both (of them) are moves likely to be rejected as undemocratic. These suggestions show that the phenomenon of divided government is not peculiar to Nigeria and if unchecked, it has a potential for stifling the effective workings of government since the business of government can thereby be brought to a stand still.

The solution lies in fashioning out ways of minimizing its occurrence by deft political manoeuvring.

What are the constitutional implications of the executive team ticket? At what point does it actually begin. The current face up in the executive at the federal level that has since assumed serious dimensions raises these issues. Section 142 (1) of the 1999 Constitution provides clearly that:

"... a candidate for an election to the office of President shall not be deemed to be validly nominated unless he nominates another candidate from the same political party for his running... Such a candidate is 'deemed to have been *duly* elected to the office of Vice-President' if the candidate ...who nominated him as such associate is duly elected as president..."

In the light of the aforementioned conflict in the federal executive and with a view to stemming the tide for the future, certain issues need to be understood. Perhaps it is time to

23. Page 98.

24. Page 104.

recognize – *defacto* and *dejure*, that the duo campaign as a team and that whatever may have gone into the ultimate emergence of a candidate as President, his choice of associate would have counted for something with the electorate. With a view to ensuring some stability in the arrangement, there is need to consider the viability of introducing specific roles in the Constitution for the Vice-President as against the present situation that leaves whatever role he is ascribed to the discretion of the Chief Executive. The argument against this suggestion however, is that it has a potential for diluting the strength and purport of the executive presidential office. Chapter 17 interrogates the ramifications of the problem in an excellent examination of the implications of the executive team ticket.

It will be recalled that a lot of criticism trailed the provisions for impeachment and removal of a Chief Executive following the removal of Alhaji Balarabe Musa as Governor of Kaduna State under the 1979 Constitution, the element of judicial participation in the process i.e. empowering the Chief Judge to constitute the panels to investigate the allegations of wrong doing levelled against state Governors, as events have shown, has not succeeded in curbing the excesses in the implementation of the provisions under the 1999 Constitution. The exploits of some Chief Judges as demonstrated by recent happenings in Ekiti and Anambra States for example, leave much to be desired. These have since become the subject of reactions from the National Judicial Council.²⁵

The power of recall of elected legislators has not been successfully utilized as shown in Chapter 15. It was designed to establish “a culture of consultation and reciprocal control with regard to law-making and the use of power and privileges.”²⁶ Perhaps some alteration to the Constitution will facilitate its successful utilization where appropriate.

25. The Chief Judges of Anambra and Ekiti States have infact been suspended from office by the National Judicial Council.

26. *The Report of the Political Bureau (Supra)* page 141 para 8.069.

Conclusion

In the dynamics of governance, the relationship between the political arms features prominently. The judiciary is largely insulated from this power play because of its very nature. As constitutional scholars have pointed out, it has "neither the sword nor the purse." It is thus considered to be "the least dangerous branch."²⁷ With regard to the legislature and executive however, this book examines several issues that have arisen within the last eight years in the relationship between both arms of government. Chapter 8 demonstrates the need for the legislature to build an institution even as it examines how the relations between both arms have played out.

Do the issues highlighted in the introduction and the detailed analyses given in the book justify changes in the Constitution or indeed the adoption of a new Constitution altogether? Here, some concession must be made to the factors that can propel such a change. Among them are the glaring unworkability of an existing Constitution and dissatisfaction with it by the populace it is designed to serve.

In this regard the tension in the land is palpable! The sheer chicanery and flagrant violations of the spirit and letter of the Constitution have been well documented. Media reports are replete with details. It is important to note that where there is a breach of the letter of the Constitution, it may be easy to remedy. What becomes more difficult is remedying a breach of the spirit of the Constitution as such breaches are insidious and often disastrous in the long term. The reckless misuse of the provisions for the removal of the Chief Executive is an example of the trend.

The operation of the 1999 Constitution in the last eight years has shown that the Constitution itself is premised upon some fundamental assumptions – some of which have since turned out

27. Credited to Alexander Bickel – discussed by Guobadia D. A. "The Relationship between the three Arms of government in a Democracy: Nigeria's Aborted Third Republic in View." 1994, Vol. 1 No.1 *Lawyers Bi -Annual* 27-39.

to be false or (to be) misplaced. For example, there is the underlying assumption that each player in the political process will play fair and will act in good faith. The reckless wave of impeachment and removal of Chief Executives by the legislature in many instances on trumped up charges or by laughable procedures within the last one or two years has debunked this assumption. In like manner, the assumption that people will come into office (in the legislature and the executive branch) only by means of credible elections has been debunked by the reversal of some election results by the courts.²⁸

The operation of the Constitution has also exposed the flaws in the document. This is as it should be. No Constitution has ever been known to have been perfectly crafted. The process of constitutional interpretation by the courts has further exposed the imperfections. The attempt at reviewing the Constitution during the Constitutional Conference of 2005 was marred by unnecessary politicking. The controversy over the tenure of the executive beclouded every other issue and so halted the process of working for change. The aforementioned Supreme Court interpretation of the onshore/offshore dichotomy in the sharing of oil revenues in the aforementioned celebrated case of *AG Federation v. AG Abia State*²⁹ and the failure to achieve much needed peace in the oil producing areas of the Niger Delta since then has shown that the issues go beyond this.

It has been common in the last 8 years to refer to the change from military to civilian rule as a change to democracy. However, as scholars of constitutional law, politics and the political process will readily argue, democracy is not a one-off experience. It is in itself a process. It has no correlation with a sudden change in regimes or rulership. It is a culture that evolves. It may be that Nigeria will get there – indeed that too is

28. The reversal of the gubernatorial mandate given to Dr. Chris Ngige in Anambra State is illustrative.

29. *Supra*.

not unconnected with the notion of transformation that this Chapter has attempted to capture.

These developments take time. The political will to arrive at the vaunted destination must be there. The populace must itself be the agents of transformation and drive the process. It is their response to the Constitutional issues of the day, a lot of which are captured in the ensuing Chapters that will determine the direction in which things will go.

In the final analysis, this book demonstrates that government by the principles of a written Constitution, the notion of limited government is only one goal of Constitutionalism. The hallmark of Constitutionalism must be that it is but a first step in the more fundamental process of transformation alluded to at the beginning of this Chapter. It is time to locate our efforts at operating the Constitution within a framework of transformation, a build up, - gradual perhaps, but ultimately to the desired destination.³⁰ The varied experiences of the last eight years are the matrices upon which to build.

30. This is the essence of the organic interpretation of the Constitution advocated by Udo Udoma JSC in *Nafiu Rabiu v. The State* (1980) 8-11 S.C. 130.

Part I

**THE PHILOSOPHY
AND
STRUCTURE OF GOVERNMENT**



**SECULARISM AND THE NIGERIAN STATE:
SOME FUNDAMENTAL QUESTIONS OF POLITICS AND
RELIGION IN NIGERIA**

by

John Onaiyekan
(Catholic Archbishop of Abuja)

Introduction

Secularism has been one of the most controversial terms in the political vocabulary of Nigeria. A lot has been said about it during the many political debates that our nation has witnessed in the last twenty years or more. In the wake of the chain of serious social upheavals often labelled “religions” mainly in the Northern states, the term has repeatedly come to the foreground of discussion. As far back as the debates in preparation for return to civilian rule in 1979, the term became, perhaps for the first time, a subject of heated discussion. Even at the 2005 National Political Reform Conference (the political confab) issues of religion and state raised heated discussions. In all these years however, the debates seems to have generated more heat than light.

There are at least three serious questions that we must try to address:

- a. What do we mean when we speak of a “secular state?”
- b. Should our country be described as secular or not?
- c. Whatever our answers to these above questions, how do we address the specific practical issues which give concrete expression to the theoretical debates on secularity?

These are questions that we can no longer gloss over. It seems there are indeed deep and serious differences in how Nigerians envisage the place of religion in the affairs of the state. There is a limit to the differences we can accommodate in this matter and still live in peace as a single nation where there is religious

freedom and equality for all citizens. To hammer out that minimum of necessary consensus, it is necessary to clarify what we mean by the words we use in our discussion.

A careful examination of the term "secularism," its etymological origin as well as the history of the development of the concept as used in concrete human situations becomes a valid starting point. This etymological exercise would demonstrate that the term itself is open to many and at times conflicting interpretations. Where the disagreement is over different meanings of the same term, some reconciliation may be possible by a simple process of mutual clarification. Where, however, disagreement is over substance, we should be able to acknowledge such differences and work out a peaceful way in which to live with them.

What is there in a Word?

The Etymology

"*Secularism*," with its adjective "secular" is derived from the Latin word "*saeculum*," which means "generation," or "age." In Church Latin, this word took on an added meaning it did not have in classical Latin, namely, that of "world." This is in reference to the "world outside," as opposed to the inner life of the church. This church usage dates back to the Latin translation of the Bible, which at times used the term "*saeculum*" to translate the Greek word "*aionos*" where it refers to this world as distinct from the spiritual and eternal realities as in Romans 12:2. "Do not be conformed to this world." "*Nolite conformari huic saeculo.*" Thus, it soon became a technical terminology in church law. For example:

- (a) "*Clerus saecularis*" - "secular clergy" as those who live "in the world" and not within the monastery.
- (b) "*Brachium saeculare*" - the "secular arm" used in a certain historical context of civil power

and authority, as distinct from ecclesiastical authority. Thus, "secular" in this case means non-ecclesiastical, non-religious, or non sacred.

Through Latin, the term found its way into modern western European language. Thus, the French revolution carried out massive "secularization" – that is, the conversion of Church properties and institutions to secular possession and use. Incidentally, the unilateral, arbitrary, unnecessary and unjust forceful takeover of Christian institutions by several Nigerian Governments was a form of "secularization" that one associates with regimes that set out to persecute the Church.

In the English language, the word has become of current usage, not only within Church circles where it originated, but also in politics, philosophy and other social sciences. For the purposes of this discussion, it might be useful to highlight a few points from this brief etymological survey.

- a. It is a word that is mainly Christian in its origin and development. I do not know how the concept is expressed in Arabic. Whatever the Arabic equivalent, it would not be surprising if it carried connotations quite different from the English or Western word. An attempt to translate the word into any of our local languages for example will certainly show the kind of difficulties that can arise whenever attempts are made to transpose an idea from one thought pattern to the other. This may be at the least, partly responsible for the fact that the Christian – Muslim debate on this point often becomes like a dialogue among deaf people – or a conversation between two people by means of different mutually incomprehensible languages.
- b. *Per se*, the concept of secularism is neutral in respect of the sacred and the spiritual. It neither affirms nor denies

- the sacred and spiritual. It merely stresses the due autonomy of the material dimensions of life *vis-à-vis* the spiritual. It is a question of distinction, not opposition. To uphold secularism, in certain aspects of human life does not imply denying or neglecting the spiritual and sacred.
- c. However, the term, especially in its historical development has become quite ambiguous. It can mean and it has in fact at times been used to mean denial of the other world and opposition to spiritual concerns in human relations. Thus, some states, which persecute and suppress religion, claim to be "secular". But this is a relatively rare and restricted meaning of the concept.
- d. At times, attempts are made to avoid this ambiguity by distinguishing between secularism (in a pejorative sense) and secularity (as a neutral or positive term). In the final analysis, even this seems to boil down to sheer semantics - or a word - game.

The conclusion from all this is that secularism is not a univocal term. Its use is, therefore, problematic and open to misunderstanding. The debate can never be resolved on the basis of etymology alone. Perhaps a look at the history of the idea will shed a bit more light.

The development of the idea of Secularism

It is on record that as far back as 3,500 years ago, in the 14th Century B.C, the Egyptian Pharaoh Akhenaten undertook what was perhaps the first recorded attempt at secularization. He tried to abolish the traditional cults of the gods to set up Egyptian public life along rationalistic lines. It would seem that his quarrel was not so much with the gods as with the elaborate and powerful priestly caste that had very strong influence on almost every aspect of ancient Egyptian life. He did not succeed in

making a permanent impact. Similar attempts whether by some Greek philosophers or other non-conformist thinkers down the ages have generally met with little success. As a thorough-going view of life, secularism is largely a modern and Western phenomenon. In most of human history, the secular and the spiritual, religion and politics, have always been closely intertwined. This can be seen even within the history of Christianity.

a) *Earliest Christianity*

In the earliest period, the Christian community lived largely on the margins of society, far away from the corridors of power. This was a natural consequence of the socio-political status of the community, made up largely of colonized Jews and poor masses. The situation in Corinth was typical. St. Paul reminds them:

“Take yourselves for instance, at the time when you were called: how many of you ... were influential people, or come from noble families?”¹

In addition to this sociological factor, there was also a theological one: the fervent expectation of an imminent return of Jesus in glory tended to make them rather unconcerned about this world. “This world as we know it is passing away”² said Paul to his audience at Corinth. This tendency to neglect the world is however counter-balanced by numerous references indicating a more positive view of the world. “God loved the world so much that He gave his only Son to redeem it.”³ Christians are therefore not to run away from the world but to be light and salt within it.⁴ In terms of the relationship between Church and state, the Church recognized the lawful powers of the state⁵ which is what

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1. *The Holy Bible 1 Corinthians 1:26.*
 2. *1 Corinthians 7:31.*
 3. *John 3 v 16.*
 4. *Matthew 5:13-14.*
 5. *Romans 12: 19-13:17.*

is meant by the now famous text: "Give to Caesar what is Caesar's..."⁶ At the same time, the state is not absolute and Caesar's claims can never supersede the demands of God. "We must obey God rather than men."⁷ This was the quick and firm retort of Peter and John who wanted them to stop talking about Jesus.

b) *The Constantine Era*

With the emancipation of the Church around 330 AD, a new era began which was to last till modern times. It is called the "Constantine era," named after the Roman Emperor Constantine who made Christianity the official state religion of the Roman Empire. The balance was thus upset between the secular and the sacred: with an exaggerated emphasis on the superiority of the religious over the secular. For St. Augustine, the Church is the *civitas Dei* (God's realm) while the state was *civitas terrena* (earthly realm). The apex was reached in the middle ages when the Pope as head of the Church had powers over all earthly rulers who were careful not to incur Papal displeasure, or did so at great risk to themselves.⁸

c) *The Secular Reaction*

The excessive domination of the church over the state provoked reactions, first tentatively and later violently. The doctrine of the "two swords", one for the clergy and the other for the ruler was an attempt to assert the independence of civil authorities vis-à-vis the church, a doctrine which Pope Boniface VIII condemned in 1302 (*Unam Sanctam*). In similar fashion, the doctrine of the "divine right of kings" was an attempt to consolidate the authority of kings over their subjects. In the tussle which lasted many centuries, the state eventually gained the upper hand. The

6. Mark 12:12.

7. Acts 5:29.

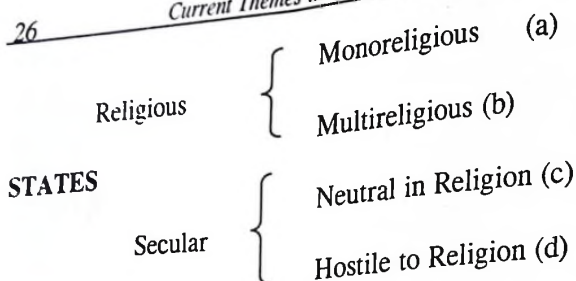
8. Charles IV at Canossa under Gregory VII in 1077 see Kempt F "The Gregorian Reform" in Jedin, H and Dolan J. *History of the Church* Vol III London; 1980 pp 381-382.

protestant reformation not only led to the still gaping division of the church, but also seriously weakened papal power. The trend continued in the philosophical currents of rationalism and liberalism as well as the political showdown at the French revolution. At the end of the day, the Papal States were lost. By the same token, many royal houses, which claimed divine rights, were replaced by democratic republics. The socialist revolution of October 1917 carried the trend even further in Russia where regimes emerged that was not only secular but atheistic. The Russian model was followed by many socialist countries, until the fall of the Berlin Wall in the 1980s.

An important conclusion from the foregoing brief historical survey is that secularism, as now understood in many modern countries, especially in the Christian West, is a relatively recent development in the 2000 years of Christianity. For almost a millennium and a half, politics and religion were intimately linked and there was no separation between church and state. If Christians now tend to advocate such a separation, it is not that Christianity has no experience of theocracy, nor that it cannot ask for it. Rather, it is as a result of rediscovery of the spirit of the Gospel Message of Christ and the demands in our day for greater freedom and human dignity. It is at the same time, acknowledging the lessons of history.

Secularism and the Nigerian State

As far as the state and secularism is concerned, in theory, as well as in practice, there are a variety of options open to different nations according to their different circumstances. Broadly speaking, from point of view of our discussion, the states of the world can be divided as follows.



Let us now take a look at these different models, to see how applicable they could be to the Nigerian situation. We should note that these are only broad schematic models. In concrete circumstances, there is often a combination of more than one model.

The Monoreligious Model

Even today, there are many countries which have adopted an official state religion. Barrett⁹ lists 23 countries in 1980 with 8.6% of the world's population as having Islam as the official state religion. In the same year, 25 countries declared themselves officially Catholic with 5.3% of the world's population. The clearest instances are Saudi Arabia and the Holy See (to the extent that it can be considered a "state") where Islam and Catholicism are respectively the only acknowledged religion. Most of the countries in this category theoretically make allowance for other religions. In practice however, the scope given to non-official religions differ a great deal. In many cases, it amounts to real religious discrimination. The official religion has always a decisive advantage over the others.

The Multireligious Model

In some countries, there is no single official religion, but government recognizes a number of religions and promotes their activities. Examples are Germany and Lebanon. Here, the system rests on a careful balance between the different and at times,

9. Barrett D.B (ed) *World Christian Encyclopedia* Nairobi (1982) p 777.

conflicting demands of the various recognized religions. There is also the added difficulty of catering adequately for all religions. The recent agitation of Muslims in Germany and in some other European countries for greater recognition and support illustrates this. Some people, especially in recent times, have suggested that Nigeria should be classed in this category since government is directly involved in promoting some religions at least. However, since the constitution itself does not describe Nigeria as a "multi-religious state" we have to consider any excessive state promotion of religion a constitutional aberration.

The Religiously Neutral

This refers to states which officially at least, prefer to keep religion at the private level. The state recognizes the right of people to practice the religion of their choice, not only in private, but also as organized groups. The state could also support the social activities and services of such groups. Most modern states belong to this category. They usually describe themselves as "secular," which means that the state as such is neither organized on religious lines nor ruled by religious laws.

The Religiously Hostile

Finally, there are secular states which are officially atheistic and anti-religious. Classical socialism used to be so. There are still remnants of this in countries like Cuba, Vietnam and China. This does not necessarily mean that the nation, as a whole, is atheistic. Poland was a very Catholic country ruled by an atheistic regime. Almost invariably, such regimes do not respect the religious freedom of citizens who choose to practice a religion.

Considering the four categories mentioned earlier, it should be obvious that for Nigeria, the first and the last are untenable. The 1999 Constitution clearly excluded type (a) when it provided in section 10 that

"The Government of the Federation or of a State shall not adopt any religion as State Religion."

This section of the 1979 Constitution has been repeatedly reconfirmed by all subsequent regimes, military and civilian right up to the present one under the Constitution of 1999 which in section 10 similarly prohibits the adoption of state religion. With the pluralism of religions in Nigeria, to adopt any one as state religion will certainly bring about injustice to the rest. However, it seems the question is still open as to what constitutes "adopting a religion as state religion." This is the point of the on-going debate over the new dimension of the Sharia in some Northern States.

It is significant that this aforementioned provision speaks not only of the Federal Government, but also of State Government. This means that even if a state had a 100% Catholic population, it could not make Catholicism state religion. It is alleged that some of the Northern States are actually being run as if Islam has been adopted as state religion especially where there is a near total Islamisation of almost every aspect of official public life. There will be need to agree among ourselves on what government may legitimately do in the area of religion even at state level. Any situation in which government is promoting one religion to the detriment of others is certainly against the spirit of our Constitution.

As for option (a), Nigerians are so deeply religious that no atheistic government can claim to represent the people. We are, therefore, left with options (b) and (c).

Theoretically, we could adopt the multi-religious options. This will mean listing out all the religions and denominations that government will promote and officially recognize. Already this will present serious difficulties: the list of recognized religions will be too long to handle adequately. The present practice of recognizing Christianity and Islam as the two religions of Nigeria is only approximate. Within each of the two groups, there are

appreciable differences in denominations: while everyone does not necessarily fall into one of the two religious groups. Some people will always feel unjustly left out. For example, when the Babangida regime tried to inaugurate a "Council for Religious Affairs" comprising religious leaders drawn from among Christians and Muslims, the Chief of General Staff at that time warned the Council not to forget that there were other religions in Nigeria besides Islam and Christianity. That warning was futile since members of such a Council can only represent their respective religions. In any case, it was a belated warning. Government itself ought to have made provision in the Council for those "others" if it felt so strongly about their interests. The same issues have arisen with the Nigerian Inter-religious Council, (NIREC), although in this case, we are not dealing, strictly speaking, with a government appointed body, but rather a voluntary forum for dialogue put together by the leaders of the two major religions in Nigeria.

Even if our list of religions were exhaustive and complete, there is the next problem of dealing equitably with each of them without favouritism and partiality. The polemics over government handling of pilgrimages shows how difficult it is to be fair and appear to be fair in these matters.

For these reasons, many people have come to the conclusion that the best model for Nigeria is option (c). This means that government would be advised to keep its direct involvement with religion to the barest minimum, in accordance with the spirit and letter of our Constitution i.e. state neutrality in religious affairs. Unfortunately, this is an area in which it seems every government has found it difficult to be clear and consistent in spite of the fact that the matter has been discussed several times in the past.

In the first stages of its work, the sub-committee on National Objectives of the Constitution Drafting Committee in 1978 did

propose that Nigeria be explicitly described as "secular."¹⁰ In subsequent drafts, the word disappeared from the text. It surfaced again during the debate at the Constituent Assembly. Opposition against the term came largely from some Muslim members, led at that time by Alhaji Shehu Shagari, the future President. They maintained that it could lead to making it unconstitutional for the state to have anything to do with religious matters like pilgrimages and the Sharia. The formula in section 10 of the 1979 Constitution also transposed to that of 1999, was supposed to have satisfied both sides. The experience of the past years shows that the matter is still to be settled to the satisfaction of all. A dangerous ambiguity still hangs over the nation on this important issue. It should be resolved somehow so that religious peace may be possible.

At present, there are several areas of our national life which we need to look into dispassionately with a view to finding a policy that would best promote peace, harmony and progress. We shall now direct our attention to some of them.

Some Areas to Watch

Before we conclude this piece, a few practical areas of concern where the interaction of religion and politics is played out in concrete terms shall be noted.

Support of Religious Projects

This is generally an area of controversy and sometimes of unhelpful rivalry. We must admit and indeed recommend, that the state has reasons and at times obligations to support certain projects undertaken by religious organizations. This is particularly true with respect to projects of a social nature. Here the name of the game should be partnership. The areas that come very quickly to mind are education, health and social welfare. These are areas where both the state and religious organization

10. See the Federal Ministry of Education, the report of the Constitution Drafting Committee Vol II, Lagos (1976) p. 36.

have not only legitimate stakes but also respective competencies. These are also areas that affect the citizens, irrespective of their religious affiliation. It is therefore to be expected that public funds should be made available to religious institutions when they undertake projects for the good of the community. Most civilized nations have for long undertaken this. Thus, they have not hesitated to fund schools, hospitals and other social welfare projects run by religious organizations.

In our country too, we have had our experience of such collaboration in earlier times, especially in the colonial era but also immediately after independence. There will be need to revisit this whole issue especially if we really want to serve our people in the best way possible with the resources available.

But what about support of government for what could appear as purely religious projects, like building places of worship or even contributing towards the formation and training of religious personnel. Here I believe we should be guided by two considerations: caution and equity. Caution because this kind of government involvement in religion should be undertaken in such a way that the respective autonomy of the state and religious organizations can be maintained and safeguarded. Equity because the citizens belong to different religions. Therefore, government support for purely religious projects would need to be handled in an equitable way. The difficulty of attaining the right balance is quite obvious.

In this regard two specific projects come to mind. First, there is the project of the National Mosque and the Christian Ecumenical Centre in Abuja. At first, these two projects generated a lot of controversy. It seems now there is a general consensus that the two projects are worthwhile and may even be useful to the nation. They have since been declared national structures/ projects by the President. Perhaps, it is best seen as one area where the state and religious bodies cooperate in a project that is of common interest. Second is the issue of pilgrimages. We know how much controversy has been

generated over the years on this matter. It is a good thing that the tendency of government is now to gradually hands off the funding and even the organization of pilgrimages. Some of us have always held to that view, especially as we believe government funds could be spent in more useful ways. Besides, each religious organization ought to be able to organize itself for pilgrimages to wherever their adherents want to go. This of course does not stop government from offering logistic assistance both at home and in the countries to which pilgrims go.

Government Religious Agenda

Whether the government is religious or not, there are certain programmes and projects that government in Nigeria has taken as official. To examples easily come to mind. We are all familiar with the religious chaplaincies in government institutions, whether it be the armed forces or the higher institutions. I believe that this is again an area of fruitful collaboration between the state and the religious organizations. Luckily, there has not been much controversy in this matter. I believe that the principle of government maintaining these chaplaincies while giving the religious organizations their proper role in assigning personnel to function in those institutions is a wise disposition. In all these however, there is need for constant dialogue and improvement of strategies and methods.

The other area is in cases where places of worship have been built in government premises, especially in government houses and in the State house. It is important that the purpose of such projects be made clear. It is trite that whoever rules the nation either at state or national level not only deserves but also needs spiritual attention and guidance. Just as Governors and Presidents have personal physicians, we believe that they do also need personal spiritual advisers. The places of worship in government houses and the state houses can be seen as facilities to improve the spiritual life of the leaders and those who work with them. At present, these matters are being handled rather haphazardly. It is

possible to formalize the practice in such a way that it will not depend on the whims and caprices of whoever is in power. It is also important to make sure that whatever public resources are expended on such matter are easily accounted for.

The Legal System

The issue of religion in our legal system has already been referred to. This concerns mainly Islam in Nigeria, particularly with the place of the Sharia in our public life. A lot of debate has been going on over this issue, and I am convinced that the matter is not yet settled. We obviously need to admit the burden of our history and the carry-over of certain past practices. At the same time however, we must look at the present and towards the future. Certainly, the future lies with a uniform law for every Nigeria, in order to enhance our unity and common existence. The sooner we start moving in that direction, the better. Whatever provision is made today for the Sharia either on the national or indeed at state levels will remain a constant point of debate until a clear solution is arrived at.

It is in this regard that the latest development, where certain state governments have adopted a Sharia Code of Law for their entire states, is with all due respect, a step in the wrong direction. We all know that there is very strong division of opinion as to whether those steps taken by our civilian politicians in the last few years are in accordance with the Nigerian Constitution. It is wishful thinking to hope that the *status quo* will continue indefinitely without being challenged. One thing is obvious: the whole adventure has generated not only controversy but grievous disturbances, leading to the loss of hundreds and thousands of lives. We also hope that the nation has not decided to close its eyes to the fact that thousands, perhaps millions of Nigerians have decided to relocate away from those states precisely because of the consequences of these latest developments. We know that this is partly responsible for the population explosion in the suburbs of Abuja. This is an issue

that was never placed before the Nigerian public in the political campaigns of our rulers. It is time the debate be allowed full discussion.

Foreign Policy

In this connection, we all still remember the hue and cry generated over the issue of Nigeria's membership of the Organization of Islamic Conference (OIC). Up till now, the position of Nigeria has remained nebulous. I believe the fact right now is that our country is considered a full member of that organization. A lot of effort has been made to justify our membership of the body. The arguments have, however, always gone largely along religious lines and most of the time have been unconvincing on logical grounds. At the end of the day, the question is whether Nigeria ought to be a member of such a body, simply because some Muslims want it or whether it is a matter that requires the full consensus of the Nigerian nation.

Closely linked with this is our policy, if any, with regard to our diplomatic representation in countries that claim to be officially religious, in particular the nations that are considered Islamic nations. The tendency seems to be to presume that only those who share the religion of the said nations can properly represent our country in those places. But I believe that it is necessary to make it clear to all nations that whoever represents Nigeria anywhere must represent all Nigerians and not just a religion. That is why Christians and Catholics in particular, have not complained that Muslims have sometimes been assigned to represent our country at the Vatican. We expect too that it should not be considered unheard of that a Christian be assigned to represent Nigeria in Saudi Arabia. After all, the Saudis have many non-Muslim diplomats representing different countries. These are the kinds of areas where conscious effort need to be made to make it clear that in terms of official government position, our nation is for all.

Conclusion

The crucial issue is not the words we use to describe our nation, but the concrete policies by which our national life is regulated. The term "Secular" is not our language; we can agree to stop using the word if we find it confusing. The country must, however, have a clear policy on state and religion, which everyone is ready to accept as binding. The Constitution has already excluded making any religion the official religion of the federation or of any state. This must be scrupulously obeyed. In concrete instances, government action in matters of religions must be guided by the principles of freedom for all, and equality of all religions *vis-à-vis* the state. The ordinary laws of the land have adequate provisions for dealing with any misuse of religious freedom. The state should strive to create conditions for greater integration among its diverse citizens and watch against any policies that might deepen suspicion or arouse jealousies among religious groups.

This is necessary if religious groups are to be in a position to contribute positively to the progress of the nation. For far too long, religion has been perceived as one of our many problems. It is about time it begins to play its true role of honouring God and serving the neighbour.

3

RELIGION AND THE STATE IN NIGERIA

by

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Introduction

A discussion of this topic must of necessity start with the definition of terms. What then is religion and what is a state?

Religion

The *Chambers Dictionary* defines Religion as:

“Belief in, recognition of an awakened sense of a higher unseen controlling power or powers, with the emotion and morality connected with such.”¹

Dr. A.A. Idowu’s definition which has a legal bias provides as follows:

“In its *constitutional* connotation, religion means a particular system of faith and worship recognized and practiced by a particular Church, sect or denomination. In Nigeria, there are three main systems of faith: Christian religion, Islamic religion and Traditional religion.”²

1. *The Chambers Dictionary*, Harrap Publishers Ltd. 1998 at page 1395

2. A.A. Idowu: ‘Law, Religion and Politics: The Nigerian Situation,’ unpublished work, at page 8.

State

The *Chambers Dictionary* defines "State" in the following terms:

"A political community under one government,"

or

"One of a number of political communities forming a federation under a central government."³

It is necessary to observe that the second definition is more relevant to Nigeria which operates a Federal system of government.

This Chapter is multifaceted in nature and will be treated *seriatim* in that light. Accordingly, the Chapter has been subsumed under separate headings so as to give it the very sharp focus which it deserves.

Prohibition of State Religion

Section 10 of the Constitution of the Federal Republic of Nigeria 1999 provides:

"The Government of the Federation or of a State shall not adopt any religion as State Religion."

It cannot be over-emphasized that this provision is the corner stone of the relationship between Religion and State in Nigeria. Commenting on this provision, Professor Jadesola O. Akande has observed as follows:

"This is in recognition of the fundamental human right of freedom of religion. A lot of arguments have raged on the meaning of this section. Some argue that this means that Nigeria is a secular state. Some argue that the Nation does not recognize any religion. But it does not appear that there is any ambiguity in this

3. *The Chambers Dictionary*, 1998, *op.cit*'at pages 1614 to 1615.

provision. It simply means that every individual is free to practice his/her religion without State interference."⁴

It is pertinent to observe that the provision of section 10 of the Constitution was examined at great length by the Presidential Committee on the Review of the 1999 Constitution. From the representations the Committee received, it identified two schools of thought. The first school believed that the intention of this prohibition in the context of the complex and diverse structure of Nigeria was to ensure a clear separation and dichotomy between faith and governance. For this school of thought, there is a preponderant opinion that the provision of the secularity of the State should be strengthened by inserting a clause in the 1999 Constitution which would make it a breach of the Constitution for any Government to fund or directly participate in religious activities.⁵ Such activities would include providing grants for the promotion of religious activities, establishment and funding of Welfare Boards for Muslim and Christian Pilgrimages. It was contended that the role of Government in matters of religion should be limited to that of ensuring that the conduct of any religious group or the practice of any religion does not violate the fundamental rights of both adherents thus justifying the legal maxim *sic utere tuo ut alienum non laedas* (use your own rights so that you do not interfere with those of another).⁶

To the second school of thought, faith can be in harmony with conduct and a State can be governed and administered on sound

4. Jadesola O. Akande: *Introduction to the Constitution of Nigeria*: Lagos, MIJ Publishers 2000 at pages 46-47.
5. Report of the Presidential Committee on the Review of the 1999 Constitution Vol. 1 at pages 50 and 51. Quoted with approval by Emeritus Professor D.A. Ijalaye in his Lecture *The Imperatives of Federal/State Relations in a Fledgling Democracy, Implications for Nigeria* being the Annual Lecture of the Nigerian Institute of Advanced Legal Studies 2001 at page 14.
6. Earl Jowitt: *The Dictionary of English Law* 1959 at pages 1639-1640.

moral foundations. This Islamic worldview which espouses the organic unity of Islam and State, claims that section 38 of the 1999 Constitution confers on the individual the "freedom (either alone or in community with others, and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. For this school, there is a selective emphasis on the phrase "in community with others" to justify the adoption by State Governments of a legal system whose foundations are rooted in a Religious Code. It was further argued by this School that, in line with the nature of a plural Federation, States should be entitled to adopt such religions as appear to be preponderant within their territories.

After the Committee had considered the views of both schools, it proceeded to observe that a clear separation can, in a multi-religious nation, be maintained between the affairs of State and individual religious beliefs and practices that is secularity subject to such limits of conducts that may make State intervention necessary.⁷

The Sharia Controversy

There is hardly any other issue that has been so fiercely discussed and that has threatened the unity and stability of Nigeria as the Sharia controversy. I was a member of the Constituent Assembly (1988-89) under the distinguished Chairmanship of Honourable Justice A.N. Aniagolu. For eight solid weeks, The Assembly had failed to remove the impasse or deadlock that bedevilled the consideration of the Sharia clauses in the 1988-1989 Draft Constitution. Consequently, the former Chief of General Staff, Vice Admiral Augustus Aikhomu, came to the Assembly on Monday, 28th November 1988 and declared the Sharia provisions in the Draft Constitution "No go Areas." In this connection, Vice-Admiral Aikhomu *stated inter alia*:

7. D.A. Ijalaye *op.cit* at page 15.

"This Administration will not allow the incipient acrimony already generated by the debate on this issue to degenerate further. Government has therefore decided that it is in the national interest of the Assembly itself, to exclude Clause 6(2) to 6(d) and 248 to 263 both inclusive of the reviewed Constitution from your jurisdiction. Accordingly, the Federal Military Government has decided that this Assembly should stop further debate and discussion on these clauses."⁸

During the debate on the Sharia issue at the 1988/89 Constituent Assembly, the fears of Muslims and Christians on the Sharia issue and other religious matters were identified as follows:

- a) *The Christian:* The Christians were afraid of the progressive Islamization of Nigeria and they gave the following factors as bases for the fear:
 - (i) That the change in the nomenclature of the government of the day from the "Supreme Military Council" to "Armed Forces Ruling," was allegedly motivated by Muslim distaste of the application of the terms "Supreme" to anything other than God, i.e. Allah.
 - (ii) Nigeria's surreptitious entry into the Organization of the Islamic Conference (IOC).
 - (iii) The promulgation of Decree 26 of 1986 which removed the word "personal" from the phrase "Islamic Personal Law" generalized and extended the provision of the Islamic Law in the Constitution; Christians were concerned about the exact intentment of the Decree.
 - (iv) There is a Grand Khadi at Abuja without a corresponding provision for the President of the Customary Court of Appeal.

8. A.N. Aniagolu, *The Making of the 1989 Constitution of Nigeria*, (1993) at page 143; Quoted by D.A. Ijalaye, *op.cit* at page 13.

- (v) Abuja looks like the Muslim City with Muslim architectural designs, especially the bus stops designed like mosques.
- b) *The Muslims:* The fears of Muslims were based on the following factors.
- (i) The Common Law and much of Nigeria's Legal System derived from England is Christian inspired.
 - (ii) The Gregorian calendar which is used in Nigeria is Christian. The Muslim calendar is ignored so much that most non-Muslim do not know that it exists.
 - (iii) The salute of Military Officers with a sword or gun resembles the sign of the cross and the cross is Christian. Yet Muslim soldiers have to observe the salute.
 - (iv) The signs at the hospitals and other medical institutions also denote the Christian symbol of the Cross.
 - (v) The observance of the Sundays and Saturdays as work free days is to respect the Christians and Jewish religions respectively.
 - (vi) Many formal official uniforms of Judges, academics, etc. resemble those by Christian clergy and choristers.

Despite these accusations and counter accusations, the Assembly was able to complete the Drafting of the 1989 Constitution, which was subsequently promulgated into law although it never did become operative. The success of the 1988-89 Constituent Assembly was due to what Honourable Justice Aniagolu explained as follows.

“In the encounter in the Constituent Assembly, both sides of the Sharia divide have won. The Christians have won the victory that henceforth, the Sharia laws in Nigeria would remain for only Muslims. The Muslims, on the other hand, have won their fight that

Sharia would not be excluded from the Constitution. In this state of no victor no vanquished, Almighty God has prepared the veritable ground for peaceful co-existence between Muslims and non-Muslims in Nigeria."⁹

Mention must, however, be made to recent developments in which Sharia criminal law was formally established in Zamfara and other Northern States. Some feel that it is unconstitutional for these States to promulgate separate Penal Codes but Mrs. Jumai Audi, in a Chapter of a book, gave the rationale for the validity of these new Codes as follows:

"Thus the Governors of the Northern State argue that matters relating to crime fall under the *residual powers* of both the National and State Assemblies. On this basis, they submitted two draft laws: the Sharia Penal Code and the Sharia Procedure Code which were (legitimately) passed into laws."¹⁰

In view of this statement, it is very difficult to sustain the proposition that the promulgation of the Zamfara Penal Code was unconstitutional.

The Right to Freedom from discrimination on Religious Grounds

In order to ensure that Nigerian citizens are not discriminated against on *religious grounds*, section 42(1) of the 1999 Constitution provides *inter alia* as follows:

9. A.N. Aniagolu *op.cit* at page 145.

10. Jumai Audi, "Women's Rights, Religion and the 1999 Constitution" being Chapter Seven in Abiola Akiyode Afolabi: *Gender Gaps in the 1999 Constitution of Nigeria* at page 108.

“42(1) A citizen of Nigeria of a particular... *religion*, shall not, by reason only that he is such a person –

- (a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other...*religions* are not made subject; or
- (b) be accorded either expressly or by the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other....*religions*.”

In an apparent attempt to ensure that the above provisions on non-discrimination are respected and enforced, the Government of the Federation and the various State Governments have been *establishing and funding* Welfare Boards for Muslim and Christian Pilgrimages to Saudi Arabia and Jerusalem respectively.

In a similar vein, the Federal Government of Nigeria contributed generously towards the building of the Central Mosque in Abuja for the Muslims and also towards the building of the Ecumenical Centre in Abuja for the Christian faithful. In another sense, the Federal Government, by providing grants for the promotion of religious activities of the two principal religions in Nigeria, is by implication respecting and complying with the provisions of section 10 of the Nigerian Constitution which provides:

“The Government of the Federation or a State shall not adopt any religion as State Religion.”

Religious Tolerance and Its Enforcement

One of the *National Ethics* in Nigeria is *Religious Tolerance*. Hence Chapter II of the 1999 Constitution which deals with the Fundamental Objectives and Directives Principles of State Policy provides in its section 23 as follows:

“The national ethic shall be Discipline, Integrity, Dignity of Labour, Social Justice, *Religious Tolerance*, Self Reliance and Patriotism.”

By section 6(6)(c) of the 1999 Constitution, the foregoing provision, like the other sections under Chapter II, is not at present justiciable. We must, however, quickly remind ourselves that item 60(a) of the Exclusive Legislative List of the 1999 Constitution gives the National Assembly the power to make laws with respect to the establishment and regulation of authorities for the Federation or any part thereof –

“To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution.”

It follows from this provision that the power of the National Assembly includes the power to establish the enforcement mechanism for *religious tolerance* which is the corner stone of the much desired peaceful co-existence in Nigeria which, by its nature, is corrugated like iron sheets since it is replete with cultural, social, ethical and political diversities.

Blood Transfusion

Blood transfusion as it relates to a particular *religious sect*, known as “Jehovah’s Witness” poses very serious legal, religious and medical problems. The judicial attitude in this regard is that the obligation to treat on the part of the physician must yield to the

patient's autonomy as embedded in the right of self-determination and that any treatment of an adult person of sound mind against the person's wish may result to a civil wrong of assault and battery.¹¹ The physician's duty of care stops where the patient has expressed a contrary desire as it will amount to erosion of the autonomy of the patient and undue exhibition of medical paternalism to continue to administer treatment.¹²

In the Canadian case of *Malette v. Schutman*, the patient had given an advance directive as follows;

"NO BLOOD TRANSFUSION

As one of Jehovah's Witnesses with firm religious convictions, I request that no blood products be administered to me under any circumstances. I fully realize the implication of this position but I have resolutely decided to obey the Bible command: Keep abstaining from blood (Act 15:28-29). However, I have no religious objection to use the non-blood alternatives."

The doctor who administered blood transfusion contrary to this instruction was found liable in an action for battery.¹³

In the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,¹⁴ Mrs. Martha Okorie, a 29 - year old woman, was of the Jehovah's Witness religious sect. After delivering a baby, she had complications requiring blood transfusion which she declined on the ground of her religious belief. The first hospital discharged her after explaining the dire consequences of her refusal of blood transfusion including the likelihood of death. She was taken by her husband to another hospital where Dr. Okonkwo

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11. Anthony O. Nwafor, 'Euthanasia, Religion, Medical Ethics and Law.' Accepted for publication in *Ife Juris Review*, Vol. 2, 2004.
 12. Anthony O. Nwafor, *op.cit.*
 13. (1990) 67 DLR (4th) 324. See Anthony Nwafor *loc.cit.*
 14. (2000) 7 NWLR (Pt.711) 206 SC.

admitted her. Her husband presented a card signed by the patient and two witnesses to the Director of the hospital which reads as follows.

"MEDICAL DIRECTIVE/RELEASE

I, Martha K. Okorie, direct that no blood transfusions be given me, even though physicians deem such vital to my health or my life. I accept non-blood expanders such as Dextran, Saline or Ringer solution hetastarch. I am 29 years old and execute this document of my own initiative... The Bible commands: Keep abstaining from blood (Act 15:28 and 29)."

The directive was witnessed by the patient's husband and uncle respectively. The husband also wrote a similarly worded directive addressed to the hospital instructing that no blood transfusion be administered to his wife and he absolved the hospital from liability for any adverse consequences.

In view of the foregoing, Dr. Okonkwo acceded to the patient's request and proceeded to administer other treatment. Five days after the patient was admitted to the hospital, she died. Dr. Okonkwo was arraigned before the Medical and Dental Practitioners Tribunal on a charge of attending to a patient in a negligent manner contrary to "Medical Ethics." He was convicted by the Tribunal and suspended from practice for a period of six months. His appeal to the Court of Appeal was successful and the Tribunal's appeal to the Supreme Court was dismissed.

Ayoola JSC who delivered the Supreme Court judgment gave vent to individual autonomy founded on the constitutionally guaranteed rights to liberty, privacy and freedom of thought, conscience and religion which can only be eroded:

“Where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy. The sum total of the rights of privacy and freedom of thought, conscience or religion which an individual has is that an individual should be left alone to choose a course for his life unless a clear and compelling overriding State interest justifies the contrary.”¹⁵

This Supreme Court decision which to me is unassailable has however, been criticized by a learned writer in the following vein:

“The point we are making is that the patient’s rights should be balanced against the greater good, i.e. the rights of other persons who will be affected by the exercise of the patient’s rights... the patient was a nursing mother with other dependent minor children whose interests would have attracted a weightier consideration if judicial intervention had been sought.”¹⁶

Unfortunately, this view has not been subjected to judicial scrutiny. Attention is hereby drawn to a more recent incident. Mr. Rotimi Omokunle was recently a victim of an armed robbery attack. As a result of the severe gun-shot wounds which he sustained, the doctors proposed blood transfusion, but Mr. Omokunle refused the transfusion in respect of the neurological operation he was to undergo, his reason being that he is a member of Jehovah’s Witness Sect. He then pleaded with *The Guardian* Newspaper on his hospital

15. *Ibid* at page 244.

16. Nwosu E.O. “Disciplinary Powers of the Medical and Dental Practitioners: Disciplinary Tribunal (2000-20001)” 8 *Nig. J.P* at pages 253-4, See generally, Anthony Nwosu O. Nwofor *loc.cit.*

bed at the University of Ilorin Teaching Hospital (UIH), Ilorin as follows:

“Help me thank Nigerians for their concern for my continued existence. They have been wonderful people. However, they should help me appeal to my doctors here not to transfuse me during the proposed operation. I am a Jehovah’s Witness and my religion forbids that.”¹⁷

In view of the powerful dictum of Ayoola JSC in *Okonkwo’s* case, Mr. Omokunle’s wish cannot be overridden by the hospital or a court of law. If he died as a result of his refusal to be transfused, his death would surely have been in furtherance of his right to freedom of thought, conscience and religion guaranteed by section 38(1) of the 1999 Constitution.

Right to Life Versus Mercy Killing – i.e. Euthanasia

Euthanasia or Mercy Killing has been defined in *Black’s Dictionary* as:

“The act or practice of painlessly putting to death persons suffering from incurable and distressing disease as act of mercy.”¹⁸

The *Oxford Companion of Law* defines euthanasia as:

“The causing or hastening of death, particularly of *incurable or terminally*, ill patients and at their request. Generally, it is treated as illegal and not distinguishable from murder, largely because of the difficulty of distinguishing in legal rule, and in fact, between criminal and justifiable causing of death. A

17. *The Guardian*, Tuesday, November 23, 2004 at pages 1 and 2.

18. Black, H.C. *Black’s Law Dictionary* 16th Edition, 1991 at page 554.

narrowly distinguishable case is of refraining from seeking to prolong life in cases of great pain or inevitable death which is generally considered morally and legally permissible.”¹⁹

It follows from this definition that treatment cessation of a terminally ill patient is permissible, but the active hastening of a patient’s death is criminal.²⁰

It is instructive that some writers have proffered various clarifications of euthanasia as follows:

Active Euthanasia

This occurs by causing death through direct positive action in response to a request from the patient or his relations.

Passive Euthanasia

This occurs by withdrawal or withholding of some life support equipment from a terminally ill patient in order to facilitate or enhance the death of the patient.

Physician Assisted Euthanasia – i.e. Suicide

This takes the form of supplying information and or equipment by the physician to the patient which enables the patient to terminate his own life. An example would be prescribing a lethal dose of medication or keeping the syringe within the reach of a patient with the intention that the patient will apply it to his own destructive end.²¹

19. David M. Walker: *The Oxford Companion to Law* (Clarendon Press 1980, at page 441, quoted in O.F. Emiri’s recent Article titled ‘Euthanasia and Treatment Cessation: A Paradox.’ Mr. Emiri is a Lecturer, Faculty of Law, Lagos State University, Ojo.

20. Anthony O. Nwafor, *op.cit*

21. Odunsi, S.B. ‘Euthanasia under Nigerian Law – A Change’ (2001) *N.L.P.J* pages 62-63; see also Anthony O. Nwafor, *op.cit*

The *Locus Classicus* on the Law of Euthanasia is the case of *Airedale NHS Trust v. Bland*.²² The facts of the case were as follows: The Appellant, Anthony Bland, a 17 year old football fan was seriously injured in a disaster that occurred at Hillsborough football stadium in April 1989. His lungs were crushed and supply of oxygen to his brain was interrupted. This resulted in an irreversible damage to the centre of his brain which left him for three years in a persistent vegetable state. In that condition, he could not think, feel or have any meaningful stimuli from his surrounding, but he was breathing. He was fed food by a pump through a tube passing through his nose and down the back of his throat into the stomach. His bladder was emptied through a catheter inserted into his penis which from time to time caused infection and required dressing and antibiotic treatment. His limbs were rigidly contracted and his legs unnaturally contorted because of the stiffness of his joints. Reflex movement of his throat caused him to vomit and dribble. His condition was pitiable!²³

The doctors in the hospital were of the unanimous opinion that the condition of the patient could never improve and advised the hospital to seek a declaration from the court empowering it to discontinue all forms of life-sustaining treatment and medical support measures except those which could allow the patient to die with dignity. The court of first instance granted the reliefs on the ground that it was in the patient's best interest that the treatment be discontinued. The official Solicitor appealed to the Court of Appeal which dismissed the appeal and the further appeal which was made to the House of Lords was also dismissed.

The legal position on euthanasia in England has been clearly stated by the House of Lords in *Bland's* case. But the Nigerian position must, however, be considered in the light of section 311 of the Criminal Code²⁴ which provides as follows:

22. (1993) 1 All E.R. at page 821.

23. See Emiri, *op.cit* at pages 57-58.

24. Criminal Code Act, Cap 77, Laws of the Federation of Nigeria 1990.

“A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.”

It follows from this provision that euthanasia whether active or passive cannot at present be justified under Nigerian law. In other words, withdrawing or withholding of life support equipment from a terminally ill patient as well as prescribing a lethal dose of medication to hasten his death is definitely criminal and punishable under section 311 of the Criminal Code. The only way out is for the National Assembly to pass an amendment to section 311 of the Criminal Code so as to make euthanasia legal under Nigerian Law.

Gay Marriages: i.e. Same Sex Marriages

The crucial question to ask is this – should the State permit same sex union which is contrary to religious tenets? We now live in a strange world in which many countries have now legalized homosexuality. That is why we now speak of Gay Liberation- i.e. the freeing of homosexuals from social disadvantages and prejudices.²⁵ The world has even started conceding Gay Rights – i.e. the rights of homosexuals to equal treatment with heterosexuals. Hence on 9th November 1973, The West German Bundestag (Upper House) legalized homosexual acts among men over 18 years of age.²⁶ Also in 1989, Denmark's estimated 10,000 homosexuals got married in Danish Town Halls.²⁷ Homosexuality is no longer an offence in England; it can now take place between consenting adults but must be in private.²⁸ Many other countries have not only

25. See D.A. Ijalaye, 'The Nigerian Law of Rape in the Context of Global Development' published in the *Ibadan Bar Journal* Vol. 3 No. 1, July, 2004 at page 10.

26. Ijalaye, *loc cit*.

27. *Sunday Punch*, October 1, 1989 at page 1.

28. Sexual Offences Act (England) 1967.

legalized homosexuality, but have gone further to legalize marriages between persons of the same sex.²⁹

George Bush, the President of the United State has been very uncomfortable with Gay-marriages. This is why he has stated that he would support efforts to pass a constitutional amendment in America banning gay marriages. Some have explained this pronouncement away simply as cynical politics, i.e. an effort to motivate his core conservative supporters to turn out to vote for him in the last American election. Bush rationalized his pronouncement as aimed at protecting "the most fundamental institution of civilization."³⁰ He frowned at decisions of "activist/judges" who in Massachusetts early in February 2004, confirmed an earlier ruling that banning gay marriages is contrary to their state Constitution.³¹ It is interesting to note that the City of San Francisco, known as the gay capital of America, has been issuing thousand of marriage licences to homosexual couples. It is, therefore, a matter of time before this controversial issue arrives at the Federal Supreme Court of U.S.A where "activist judges" might likely take the same view of the Federal Constitution as their Massachusetts counterparts did of their state code i.e. that the American Constitution which demands equality of treatment should logically uphold the right of gay people to lawfully marry.³²

The idea of same sex marriage remains shocking to many people around the globe. So far, only two countries, - Belgium and the Netherlands - have given *full legal status* to same sex union. Canada has backed the idea in principle and other countries have conferred almost equal rights on such partnerships.³³ *The Economist*, which can rightly be described as the champion of same-sex unions has forcefully argued as follows:

29. Ijalaye, *op.cit* at page 11.

30. *The Economist*, February 28, 2004 at page 9.

31. *Ibid.*

32. *The Economist*, *loc.cit.*

33. *Ibid.*

“The case for allowing gays to marry begins with equality, pure and simple. Why should one set of loving, consenting adults be denied a right that other such adults have and which, if exercised, will do no damage to anyone else?... Another argument is rooted in semantics: marriage is the union of a man and a woman and so cannot be extended to same-sex couples. They may live together and love one another, but cannot on this argument be ‘married’. But that is to dodge the real question – why not? – and to obscure the real nature of marriage which is a binding commitment, at once legal, social and personal, between two people to take on special obligations to one another. If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so while other adults, equivalent in other ways, be allowed to do so?”³⁴

The current trend of recognizing and legalizing same-sex unions across the developed world has not been replicated in Nigeria and it is unlikely or unimaginable that it would ever be. This seems to have been settled by the Federal Government Same Sex Marriage Prohibition Bill, 2006 before the National Assembly.³⁵ There are a number of factors that has taken the issue of same-sex union in Nigeria to the back burner until the recent Bill submitted to the National Assembly for consideration. Religion has and continues to play a determinant factor with respect to same-sex union which is considered irreligious and abhorred by the two main religions in Nigeria- Islam and Christianity. The economic crunch in the country which has made survival a difficult task with most

34. *Ibid*

35. *S.B 294*. See also Professor E. I Nwogugu *What Next in Nigerian Family Law*: Lagos, Nigerian Institute of Advanced Legal Studies 2006 pages 10-11.

Nigerians has been a major source of preoccupation of Nigerians. What is more, there have been more national issues like Religious Conflicts, Sharia, Revenue Allocation, Border Disputes, Minority and Ethnic to contend with and address in Nigeria.

Concluding Remarks

In view of the foregoing, it cannot be over-emphasized that the relationship between the State and Religion constitutes the fulcrum on which the security, peace and welfare of the people rotate ceaselessly on the principles of Freedom, Equality and Justice geared towards the consolidation of the Unity of the people of Nigeria.³⁶

Fortunately, there are clear and copious constitutional and other legal imperatives dealing with the relationship of State and Religion particularly those that are enshrined in sections 38 and 42 of the 1999 constitution. It is therefore the responsibility of the Federal Government to see that these provisions, as well as other provisions dealing with Fundamental Rights under Chapter IV of the Constitution are scrupulously and rigorously observed and enforced.

It is germane to note that the Penal Codes of the Northern States as well as the Criminal Code operating in the Southern States have created offences which punish persons who interfere with *any form of religious worship* in Nigeria. In this connection, the recent Sharia Penal Code for Zamfara State, *for example*, has a Chapter on *Offences Relating to Religion* as follows:

Section 400 - This deals with insulting or exciting contempt of any *religious creed*

Section 401 - This deals with injuring or defiling a place of any *religious worship*.

Section 40 - This deals with disturbing any *religious Assembly*.

Section 403 - This *inter alia* deals with committing trespass on a place of any *religious worship*.

36. See the Preamble to the Constitution of the Federal Republic of Nigeria, 1999.

There are corresponding penal provisions in the Nigerian Criminal Code as indicated in its sections 204, 205 and 206 respectively.

It is noteworthy that the above mentioned laudable provisions refer to either "*any religion*" or "*the religion of any class of person.*" It therefore logically follows that the provisions are not in any way restricted to punishing persons who interfere with any of the two principal religions i.e. Islam and Christianity, but also to persons who interfere with any *indigenous religion* including the controversial Okija Shrines of Anambra State.

It is equally noteworthy that these provisions do ensure that the *various religions* in Nigeria are not only respected but adequately protected by the law thereby revamping and promoting the spirit and the tenor of section 10 of the Constitution of the Federal Republic of Nigeria, 1999 which provides that:

"The Government of the Federation or of a State shall not adopt any religion as State religion."

It is, however, conceded that the reported activities in Okija and similar shrines in the country may be declared illegal on the grounds of public policy.

THE STATE AND RELIGION IN NIGERIA

by

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Introduction

During the past three decades, politicization of religion and ethnicity has intensified. The intrusion of religion into politics and governance has eroded the capacity of the Nigerian state to rationally and effectively handle major social, political and economic problems that confront the citizens. This raises the critical question of the character of the relationship between the state and religion and its implication for democracy and citizenship rights in Nigeria. We seek in this chapter to examine the character of the relationship between state and religion in the country, especially in the light of the provisions on freedom of religion in the *Constitution of the Federal Republic of Nigeria*, (1999) and selected Declarations and Conventions of the United Nations Organisation (UN). The experience of Nigeria in ensuring freedom of religion is discussed.

Perspectives on State and Religion

In discussing the state-religion *nexus*, it is important that we realise that organised religion embody not just set of beliefs, rituals and practices but also power relations, both among members and between members and other groups in a community. Religion also competes with the state in winning the loyalty of the citizens. In doing so, it often delivers services and welfare benefits that the state either cannot provide or are ineffectively and inadequately provided. Further, it should also be realised that religious fanaticism is a form of collective identity expression and representation, which is why

fundamentalists and their followers emphasise differentiation and exclusion of people who belong to their faith and the 'outside others:'

“Religion, then, is not just a doctrine, a set of myths, a culture; it is an institutional space according to whose logic religious nationalists wish to remake the world. Religion is a network of sacred sites and spiritual spaces, as well as community centers, associations, schools, hospital, courts, and charities. In the face of failures, limits, and retrenchments of the welfare state, for instance, religious communities seek to fill the gap. Religious nationalist movements not only provide an alternative welfare-state to their members, its services are offered and consumed as a condition of and within a context of community, unlike the distant, bureaucratic, and often officious state.”¹

In essence, both the state and religion embody a structure of relations and power acting upon the citizens. Their cohabitation in any space usually engenders conflict when their spheres of legitimate authority are not properly delineated. The problem in Nigeria is that religion and state power has been bundled in a way that undermines their respective legitimacy and authority because they have failed to satisfy the expectation of citizens in their respective domains.

There are two dominant perspectives on the relationship between the state and religion. The first perspective argues that state and religion belong to different spheres and in a democratic society should be separated. This is commonly referred to as the doctrine of separation of state and religion. In contrast, the second perspective holds that state and religion cannot and should

1. R. Friedland 2001. “Religious Nationalism and the problem of Collective Representation” *Annual Review of Sociology*, 27: 125-152, at p.142.

not be separated because religion affects the totality of life. The two perspectives can be described as the secular and theocratic worldviews. But rather than treat the two perspectives as two discrete positions, it is better to consider them as polar opposites of a continuum. Different countries may be located at various points on the secularism and theocracy continuum. The United States of America may be located at the extreme end of the secular pole and countries like Iran and Taliban-governed Afghanistan may also be located at the theocratic end of the pole, while Nigeria is slightly off the centre in the direction of theocracy.

The relationship between the state and religion are worked out in a long period of struggle between the secularist and theocratic forces. For instance, the United States of America, being a British colony must have adopted the 'separation of state and religion' doctrine based on her knowledge of long-drawn out battle for hegemony between the British monarchical state and the Church of England. The 'founding fathers' of America were deeply religious people yet they did not attempt to establish a theocratic state because they learnt from the bitter religious wars and inquisitions in Europe. Rather, they infuse the philosophy and practice of governance with moralistic ideals distilled from the Christian religion.

As indicated above, the working out of the relationship between the state and religion is a long battle for hegemony and is never settled once and for all as continuing litigations on the issue in America demonstrate. Furthermore, the separation of religion from the state is never total. Even in the USA where the doctrine of 'separation of state and religion' is perhaps most developed constitutionally, jurisprudentially and judicially, the country's motto, embellished on its coins reads 'In God We Trust'. But outside of this, any symbolic representation of religion in the form of prayers, assembly, artifacts, and monuments, etc. in public institutions is contested and discouraged.

The dilemma posed by state-religion relationship is whether it is possible or impossible to guarantee freedom of religion and belief in a country where religion is the directive principle of the state. Evidence from past and present theocratic states indicates that freedom of religion cannot be guaranteed under such condition, not even for the members of the privileged religion. The events and experience in contemporary Islamic theocratic states in the Middle East (e.g. Iran) and North Africa (e.g. Egypt) or elsewhere (e.g. Afghanistan under Taliban rule) demonstrate that sects in power repress other Muslim sects, resulting in political instability. In the West, the doctrine of separation of state and religion was not worked out as a Christian value. It developed as part of the process of people's general revolt against the authoritarianism of the church, state and monarchy. In essence, it came about as a result of the victory of the people in their struggle to be *citizens* rather than *subjects*.

State and Religion in Nigeria: Historical Overview

There has been strong relationship between religion and the state in Nigeria since the colonial era. The relation has been symbiotic. Successive colonial and post-colonial governments manipulate religious identity and sentiment to co-opt or harass religious leaders and groups in the bid to gain legitimacy and retain power. On the other hand, religious leaders and groups also advance claim to material and non-material patronages from government using the platform of religion. So since colonial rule, whenever a government in the country faces credibility crisis or serious challenges from opposition and national mass movements, it appeals to religious leaders for support or to religion as a strategy for igniting confusion and suspicion among the opponents. This strategic cooptation and manipulation of religion and religious leaders by the rulers often entail treating some religious groups as allies and others as opposition with implications of inter-religious antagonism.

Evidence of the use of religion and ethnicity in this way can be found since the colonial era. Indeed, the seeds of inter-religious conflicts and politicization of religion were sown and nurtured during the colonial rule. For example in an attempt to maintain the subjugation of the people around Lagos by the colonizers in the 19th century, persons of Hausa and Muslim backgrounds, most of who were freed slaves and settlers, were recruited as police to maintain order in the Lagos Colony. The Consul revealed the importance of the practice to colonial hegemony, when in 1863 he wrote that the Hausas:

“... being from the interior and *professing mussulman [Islam] religion* are hated by the natives of these parts who had hitherto only known them as their slaves. They are disliked also by the Europeans as being of a more independent character than Lagos people. They thus have only the government to depend on and if properly managed will prove a valuable resource to this settlement (emphasis mine).”²

In this statement, the Hausa/Muslim people and the Lagos indigenes were disparaged but yet manipulated to prevent them from creating a common platform against the colonial force that oppresses and exploits them.

Such divisive and manipulative tendencies were evident throughout the colonial era. On the same issue, similar comment was made thirty years later in 1893, when another high-ranking colonial official reported that:

“In our Hausa Force we have a body of men dissociated from the countries immediately around Lagos both by birth and *religion*, and who are as a

2. Letter from Freeman to the Duke of Newcastle, December 31, 1863 in CSO/1/1/1, National Archives, Ibadan (NAI).

matter of fact hereditary enemies of the Yorubas. This is such an enormous advantage in any interior complications (emphasis mine)."³

Once again, the Hausas and Yorubas were represented as *hereditary enemies* of each other on account of religious and ethnic differences. But on the contrary, extensive trade relations existed between the two groups prior to colonial rule.

In the 1950s when regional political parties emerged in the country, appeal was made to religion in the Northern Region by the Northern Peoples' Congress (NPC) and to ethnicity in the Western Region by the Action Group (AG), both being dominant parties in the two regions respectively. Governments and elites in the country manipulate ethnic and religious identities because of the intensity of the emotion that they evoke and the number of people that can be mobilized around them. However, which of either religion or ethnicity is manipulated depends on the context. For example, religion was feasible in the North because it has a greater unifying force than ethnicity given the ethnic pluralism in the region. In the South, especially in the West, ethnicity has greater utility for political mobilization, given the relatively harmonious coexistence, and even to some existence syncretism, among the indigenous religion, Christianity and Islam in the region. Politicisation of religion and ethnicity has been a strategy of governance by the rulers since the colonial era. In the circumstance, it is difficult to confine religion to the private sphere and make it non-contentious issue in the nation's political system.

The relationship between the state and religion in the country has largely been determined by the process by which the colonial state was constituted and consolidated. Many often assert that the country was colonized through collaboration or as a joint-venture between the British capitalists and the missionaries, both

3. Letter from McCallum to Chamberlain on July 9, 1897, CSO/1/1/1/9, National Archives, Ibadan (NAI)

represented by their British imperialist state. Although, both the British capitalists and missionaries were present in colonial Nigeria, it is rather too simplistic to explain colonial rule in Nigeria as a conspiracy between them. On the contrary, besides share shared nationality and national interests, critical analyses of the relations among the British merchants, missionaries and political officials were characterized by collaboration, opposition and suspicion, especially in the Northern region.

In the North, missionaries were suspected by the British colonial officers and subject to surveillance and control so that they do not penetrate and proselyte in predominant Muslim towns and residential areas. Colonial officials often restricted missionary activities and institutions to settlements outside the traditional cities, which later developed into *sabongari* areas of cities in Northern Nigeria.⁴ This was because the British colonial officers were not inclined to incur the wrath of Muslim leaders in the North in matters that did not directly involve British imperialist interests, and religious expansion was not one. Three of the four major Christian Missions in Northern Nigeria - Sudan Interior Mission (SIM); Sudan United Mission (SUM) and the Catholic Mission were not British. Only the Church Missionary Society (CMS) had a British origin. The proposition that but for the British colonial control, Christian missions would have won more converts during colonial rule than was realized, can be argued with substantial evidence.⁵

Throughout the colonial era, the state controlled, manipulated and co-opted both Christianity and Islam. It was traditional religion that was in fact systematically suppressed through laws banning their practices and characterization of some as secret cults, prejudices that are still carried over till today, constitutionally and legally. In general, colonialism protected the

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4. Crampton, E. (1975) *Christianity in Northern Nigeria* (Zaria: Northern Nigeria Publishing Company); Kukah, M. H. (1993) *Religion, Politics and Power in Northern Nigeria* Ibadan: Spectrum Books Ltd.; Jan H. Boer (1984) *Missions: Heralds of Capitalism or Christ?* Ibadan: Daystar Press.
5. *Ibid.*

predominantly Muslim areas in Northern Nigeria from the incursion and proselytizing activities of the Christian missions while it tolerated them among the people of the Nigeria's central region, who were predominantly adherents of traditional religions. The people of the central Nigeria also welcomed the Christian missions for two interrelated reasons – as *protection from* and a *form of resistance/defiance* against Islamic jihad. The contestation of Christianity and Islam over the soul of the people of the central region continues till today and partly explains the prevalence of ethno-religious crises in the area.

Colonial government favoured Christianity, especially in the South, where it advanced its interests and favoured Islam in the North, where so doing promoted the incorporation of Muslim leaders into governance and consolidation of colonialism. The legacy and its consequences, for example in terms of gross disparities in literacy and educational services, infrastructure and industrialisation between the North and South remains with us till today, with adverse consequences on the quests for national unity, security, development and democracy in the country.

Despite the strong influence and manipulation of religion in colonial Nigeria, a state religion was not canvassed or legislated. What happened may be considered as a strategic recognition, promotion, cooptation and manipulation of religion as an instrument of political hegemony. The relationship between state and religion in colonial and post-colonial Nigeria reveals conspiracy between political and religious entrepreneurs to the material and non-material interests of the political and religious elites, such that religion will legitimize the polity which in turn will grant patronages and privileges to religious leaders. This is the root and dynamics of state-religion collaboration and conspiracy in Nigeria. But given the nature of the alliances and the changing political and economic forces, in a multi-ethnic and multi-religious society, grievances, rivalries and conflicts develop among the religious groups over state patronages.

The religious conflicts that have become frequent since 1980 should be understood against the background of the elite interests that have influenced state-religion relationship and the intensification of religion identity politics in the country. For instance, whenever the legitimacy of government is at its lowest level and further threatened by prospects of national movements such as the labour and students unions embarking on mass actions against oppression, exploitation and human rights violation, political leaders turn to religious and ethnic leaders/patrons for support. Chafe aptly noted this trend in the reaction of the military government to mass or popular agitations against the introduction and effects of Structural Adjustment Programme in the second-half of the 1980s. According to him:

“... since the inception of SAP, the Babangida regime went out of its way to in a systematic and organized manner silence all popular and democratic organisations that are capable of challenging its harsh policies. However, the regime had on the other hand, extended support and a lot of its patronage to religious organisations such as the Jama’atu Nasril Islam (JNI) and the Christian Association of Nigeria (CAN) ... a development which has more than ever before promoted a culture of religious bigotry.”⁶

The inter-religious rivalry and competition fuelled by manipulation and differential patronages by the government in various states of the Federation periodically erupt into violent conflicts during which thousands of people have either been killed or maimed and property worth millions of Naira were

6. Cited in Ibrahim Mu’azzam and Jibrin Ibrahim (2000) “Religious Identity in the Context of Structural Adjustment in Nigeria” in Atahiru Jega (Ed.) *Identity Transformation and Identity Politics under Structural Adjustment in Nigeria* Nordiska Afrikainstitutet, Uppsala in collaboration with The Centre for Research and Documentation, Kano, p.63

either destroyed or looted. Religious violence in the country is largely a product of competition for state patronages by the religious leaders and the continuing flirtation by political rulers with the religious leaders and groups to gain and retain power. This can be significantly substantiated by the fact that very few of the violent religious conflicts in the country had been caused by disputes over the right to practice religion. Instead they were generally caused by competition for patronages - resources and visibility that can enhance bargain with the government. The grievances of marginalization by the religious leaders echo the complaints of ethnic entrepreneurs. Dwindling resources caused by poor economic management, corruption and irrationalities introduced to governance by ethno-religious competition for state patronages since the early 1980s limited the capacity of the state to maintain the favour of competing religious groups on "equality basis". Consequently, there is un-ending rivalry and antagonism among religious groups and leaders to become the 'beautiful brides' to be courted and showered with patronages by the state. Religious violence is sometimes a weapon employed by religious leaders whose means of livelihood and self-worth are dependent on state patronage to protect their positions and relevance.

In Nigeria, the doctrine of separation of religion and state has unfortunately seen by many as a Christian doctrine. What appears to tie the doctrine to Christianity was the historical experience of persecution of even Christians by Christian in theocratic states. Based on the experience, which is also being witnessed in many Islamic states today, Christians have generally come to believe that freedom of religion is best guaranteed not by a theocratic state but rather by a 'neutral' democratic state that does not privilege one religion over the rest or particular sect of a religion over another.

Theocracy poses a threat to religion generally because every religion consists of sects with multiple and conflicting theological interpretations and practices; each sect seeking to assume hegemonic position and to be recognized as bearer of the correct

knowledge of the faith. This is as true in Christianity as in Islam.⁷ The discourse on appropriate relationships between the state and religion is highly emotive due in part to ignorance but even especially because of the state patronages anticipated or actually enjoyed by many protagonists and antagonists of separation of state and religion. Substantial evidence exists in the Bible and Quoran as well as from traditions and history that there is ambiguity in the position of the two religions as regards theocracy.⁸

There are several important factors that are often neglected in the discourse of state religion and freedom of religion in Nigeria. The first is the mistaken assumption that there are only two religions in the country – Christianity and Islam. Second, it is often also forgotten that religious identification (as Nigerians are often compelled to indicate on official records and applications) is different from religious commitment. There are Christians and Muslims (who in the absence of threat of being branded an apostate) share the view that the state should not intervene in religious affairs of the citizen beyond providing appropriate constitutional framework for freedom of religion. Third, neither Christianity nor Islam is homogeneous in doctrine, practice and world-view. For long it was believed that only Christianity was riddled with sectarian doctrinal contestations. But events since 1980 such as the Maitatsine riots, and conflicts over 'ownership of true Islam' among the Muslim groups like the Sufi brotherhood (Quadriya and Tijaniya), Shi'ite and Izala have proved otherwise.

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7. See empirical of these tendencies in Islam in John Padden (2002) "Islam and Democratic Federalism in Nigeria" *Africa Notes* No.8; (March): 1-10; Adeline Masquelier (1996) "Identity, Alterity and Ambiguity in a Nigerien Community: competing definitions of the 'true' Islam;" pp.222-244, in Chard Werbner and Terence Ranger (Eds.) *Postcolonial Identities in Africa* London: Zed Books Ltd.
8. In respect of Islam in which the theocracy is often tendentiously argued by fundamentalists and entrepreneurs, see a good discussion of this theological discussion by Ibrahim Mu'azzam (2002) "Islam in a Plural Society: Between the Sacred and Profane," in EEO Alemika and FO Okoye (eds.) *Ethno-Religious Conflicts and Democracy in Nigeria*. Kaduna: Human Rights Monitor.

The religious contestations in the nation is not borne primarily out of desire to promote virtues and development, but rather, they serve as instrument for gaining access to and drawing patronages from the state, especially given the dwindling resources and insatiable greed and corruption of the few who control the governments at the national, state and federal levels. The growing and increasingly destructive ethnic and religious violent conflicts that now characterize the country are caused by the increasing frustration of those excluded from a share (or a *fair* share) of state resources and by the interest of the ethnic and religious entrepreneurs who turn agitation to investment, to mobilize and manipulate identities for their personal material benefits and political gains.⁹

Freedom of Religion in UN Declarations and Conventions

The first difficulty in discussing freedom of religion in the context of a democratic society is how to delineate the scope of the freedom. In essence what does freedom of religion mean, include or exclude? Religious conflicts in democratic and secular society often arise from differing ideas on what freedom of religion permits or prohibits. According to Happold:

“The right to freedom of religion has two distinct aspects, one of which more problematic than other. Firstly, there is the right to adhere to a particular religion, the right to hold or believe in a particular set of beliefs. Second, there is the right to manifest that set of religious beliefs; the right to act out one’s beliefs or what is referred to ... as the right to

9. Mu’azzam, Ibrahim and Jibrin Ibrahim. 2000. “Religious Identity in the Context of Structural Adjustment in Nigeria” in Jega, A. (ed.) *Identity Transformation and Identity Politics under Structural Adjustment in Nigeria* Nordiska Afrikainstitutet, Uppsala and Centre for Research and Documentation, Kano. See also Muazzam, Ibrahim. 2005. “Religion and Politics in Nigeria,” in EEO Alemika and FO Okoye (eds.) *Human Rights and Sharia Penal Code in Northern Nigeria*, Kaduna: *Human Rights Monitor*

profess, practice and propagate one's religion. It is this second aspect of the right to freedom of religion that is the problematic one."¹⁰

It is in the area of professing and practicing religion that disagreements and conflicts over the interpretation of the scope or limit of the freedom of religion are often witnessed. In practical terms, freedom to practice religion may entail the following:

"...worship, processions, pilgrimages, the wearing of apparel, the use of equipment and symbols, disposal of the dead, holidays and rest days, dietary practices, the celebration and dissolution of marriages, the propagation of marriages, the training of personnel, refusal to take oaths or to undertake military service, abstention from ceremonial occasions, confessional secrets, and objections to preventive medical measures."¹¹

Some of these may infringe on the rights of others or even undermine the efficacy of government policies. Therefore, there will be attempt to limit by law some of the religious practices listed above but which in turn may instigate rebellion by those who believe that their religious freedoms are being curtailed.

Several UN legal instruments have tried to identify the core elements of the freedom of religion. Article 18 of the Universal Declaration of Human Rights (1948) states that:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom

10. M. Happold: 2003. "Freedom of Religion: Recent Developments in the Commonwealth". In M. Anderson and M. Happold (Eds.) *Constitutional Human Rights in the Commonwealth*. London: British Institute of International and Comparative Law; pp. 127-142 at p.127

11. *Ibid*, p. 128.

to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

However, the Declaration did not provide sufficient guidance as to the limit of expression of these rights. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) was more elaborate in its clarification of the ingredients of freedom of religion. The Declaration in Article 1 provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his/her choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his/her freedom to have a religion or belief of his/her choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others staff.¹²

Article 2 of the Declaration provides that:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.
2. For the purpose of the present Declaration, the expression “intolerance and discrimination based on religion or

12. These provisions in paragraphs 1-3 reproduced Article 18 of the International Covenant on Civil and Political Rights (1966).

belief" means any distinction, exclusion, restriction or preference based on religion, or belief and having its purpose or as its effects nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis

The Declaration in Article 6 offers an elaborate description of freedom of religion, providing that:

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedom:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion and or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

The critical question is whether these rights or freedoms can be enjoyed without impinging on the rights of other people. It may even be argued that the doctrine of separation of state and religion is justified by the need for an umpire with the responsibility of ensuring the conditions under which these rights can be exercised without infringing on the rights of adherents of other religions.

Nigerian Constitution and Freedom of Religion

The fear of domination on the basis of ethnicity and religion has found expression in political discourse and constitution-making in Nigeria. Both were strongly expressed in the negotiations that preceded independence from British imperialist power in 1960. In order to mitigate the fear and actualisation of ethnic and religious discrimination and oppression, the Independence Constitution (1960) and the subsequent Constitutions of the Federation contain elaborate provisions enshrining the fundamental rights of the citizens. Besides, Nigeria is a member of the United Nations organization, which has produced Declarations or Conventions that provided for freedom of religion. It is worthwhile highlighting some of these provisions in the UN Declarations and Conventions before discussing the freedom of religion provision in the Nigerian and Constitution and to what degree they have been observed by the citizens and enforced by the government.

The 1999 Constitution contains several provisions that enable us to gage the weight of permissible relationship between the state and religion in the country. The debate in this area often hinges on the provision in section 10 of the 1999 Constitution alone instead of a wider appreciation of the provisions on human rights in different parts of the document. The section states that:

"The Government of the Federation or of a State shall not establish any religion as State Religion". Significantly, the title of the provision which was provided on the margin of the provision reads 'Prohibition of State Religion.' What does the provision imply? At the minimum, it prohibits the state from committing its power and resources to a religion. If the state seeks to be involved in religion, it has to give *equal treatment to all religions* in its domain."

Prohibition of State Religion

The Constitution restrains the state from establishing a state religion. There are two plausible interpretations of the provision. The first is that the state is prohibited from being involved in the promotion of religious dogmas and doctrines, laws, and institutions. In the context of democratic federalism, this would imply that the state should not establish, promote, favour, fund, patronize or disfavour any religion. While Nigeria did not establish any religion, it presently promotes, fund and patronize some religions or a religion at the expense of others, in contravention of the constitutional provisions. For example it privileges Christianity and Islam above others as evident in the now hypocritical request for a Christian and a Muslim to pray during official functions and meetings, if even the topic of the discussion will be how to corruptly enrich the participating officials and their cronies. The sponsorship of people for pilgrims, and the preferential foreign exchange rates for pilgrims as well as establishment of Pilgrim Boards for Christians and Muslims promote the interests of these religions above other religions in the country, and even constitute a blatant discrimination against those without religion. The second interpretation will be that of equal recognition and moderated proportional representation. Under this interpretation, the State will be required to grant equal recognition and worth to *all*

religions within the territory. This interpretation is strengthened by the prohibition of discrimination provision in the Constitution. Further, the interpretation will allow for representation whereby, all religions will be represented, first on the principle of equal recognition and subsequently based on proportional representation. Consequently, the representation in accordance with the criterion of equal recognition will be secured before adjustment for proportional representation. However, in multi-religious society, this will be very difficult.

Prohibition of Discrimination

The Constitution prohibits “discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties ...”(Section 15 (2)) More specifically, it provide in section 42 that:

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he/she is such a person:
 - (a) be subjected either expressly by, or in the application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities, or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, religions or political opinions are not made subject; or
 - (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

The import of the provision is to create common, equal and free citizenship in all parts of the country. But some provisions of the Islamic penal code in the country indeed created divided and unequal citizenship between Muslims and non-Muslims.

The political and economic underpinning of religious agitations and conflicts are observable in the hypocritical actions of the religious entrepreneurs who activate, mobilise and deactivate religious contentions as a channel for accessing government patronages and for excluding others. Immediately after the inauguration of the Political Reform Conference in 2005, the Muslim leaders protested to the government on the ground that the Chairman and Secretary of the Committee are Christians. Paradoxically, all Northern States have indigenous Christian population. However, nearly all of the governments in the North where the Muslims constitute majority¹³ failed to nominate a single Christian as a representative to the Reform Conference, despite protests. Yet the governments and Muslim leaders do not appear to be concerned about the evident hypocrisy when they complain of insufficient representation in the leadership of the Conference. Worse still, in most of these states, Christians who are indigenes of those States are excluded from appointment at higher positions in government though they were often better qualified.

Freedom of thought, Conscience and Religion

Section 38 of the Constitution provides that:

- (1) Every person shall be entitled to freedom of thought, conscience, and religion, including freedom to change his/her religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

13. These are Katsina, Kano, Zamfara, Kebbi, Yobe, Borno and Jigawa States.

- (2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony if such instruction, ceremony or observance relates to a religion other than his/her own, or a religion not approved by his/her parent or guardian.
- (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.
- (4) Nothing in this section shall entitle any person to from, take part in the activity or be a member of a secret society.

Many aspects of these provisions are violated once a state government privileges a particular religion, as is the case with the introduction of the Sharia penal code, and compels adherents of other religions to organize their economic, social and cultural activities in conformity with the rules and laws of the state favoured religion. In addition, in many Northern states, the government funds and compels the teaching of Arabic language and Islam even in Christian schools. But the same government fails to fund and ensure the teaching of Christianity or other religions. Similar discriminations has been reported in relation to access to land and government facilities (such as television and radio broadcasting services) by other religions, in addition to the state coercing pupils, students and health workers belonging to other faiths to wear uniforms prescribed by Islamic authority and tradition.

Equality before the Law

Section 17(2) provides that "every citizen shall have equality of rights, obligations and opportunities before the law." The provisions in Sharia penal code created inequality of non-Muslims and Muslims before the law. Strictly adhered to, the provisions of Sharia, in many respects, disproportionately punish Muslims than their Christian counterparts. In other respects, it prevents non-Muslims from engaging in trades and commerce that they deem legitimate in order to protect the interests of the Muslims.

Prohibition of Religious and Ethnic Parties

Section 222 provides that no political association shall have be registered as a political party unless:

- "the membership of the association is open to every citizen of Nigeria irrespective of his place of origin, circumstance of birth, sex, religion or ethnic grouping"
- "the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria."

At present, no party with overt religious agenda has been registered. However, in campaigns, religious sentiments have been widely mobilized, thereby undermining the spirit of the provision.

Prohibition of Torture, Inhuman or Degrading Treatment

Section 34 (1) (a) provided that "no person shall be subjected to torture or inhuman or degrading treatment". This provision has not been interpreted in relation to the provisions of penal code, but it will be difficult to construe amputation, stoning to death and corporal punishment as anything other than degrading treatment.

The preceding discussion is meant to illustrate the debates and controversy on the constitutionality of government's involvement in the patronage of religion and especially in enforcing the tenets of a given religion as laws and public policies. Both in law and practice many Nigerian states have indeed adopted a state religion contrary to the provision of the Constitution. Many Nigerian states and public institutions have also favoured particular religions to the detriment of others.

Conclusion

Theocracy rests on the doctrine that 'religion can and should have a role in the regulation of all social life'¹⁴. The doctrine and ideal of separation of the state and religion, often described as secularism do not mean that individuals cannot practice their religion. However, it means that other people are protected from the excesses and prejudices of the militant religionists, who often favour coercive proselytising and conversion. It also protect the religionists from unwarranted by those who holds to other beliefs. Under the separation of religion and the state, everyone gains but under theocracy or state religion, some people are empowered and others are dominated - politically and economically.

Secularism does not imply negation of religion as many theocrats and religious entrepreneurs assume. Rather, it implies 'the disengagement and differentiation of the public sphere from religion'¹⁵. Mua'zzam and Ibrahim have aptly captured the essence of secularism, as it relates to the separation of the state and religion thus:

“...secularization refers to three distinct phenomena- the differentiation between secular and religious spheres, the decline of religious beliefs and practices

14. *Ibid.*

15. R. Friedland 2001. "Religious Nationalism and the Problem of Collective Representation" *Annual Review of Sociology*, 27: 127.

and the marginalization of the religious sphere to the private domain... A secular society is not homogenous. It is pluralist, tolerant, without official images and does not commit itself as a whole to any particular view of the nature of universe and the place of human beings in it. Thus, both Islam and Christianity, if we accept this position, could find a place and exist independent of the other in a secular society. Our notion of secularism is thus oriented towards the guaranteeing of religious freedom to all groups; that the state can neither prescribe nor proscribe religion. People may, in fact, need a secular society, especially in a heterogeneous society to assert their freedom."¹⁶

This type of understanding of secularism will help to reverse the increasing violations of the Constitutional provisions on freedom of religion by many state governments and religious groups in the country.

Largely, the violations of the constitutional provisions do so because of political and economic interests disguised as quest for religion devotion and piety. In the circumstance, what is required is that the federal government fulfil its responsibility of preserving the rights of every citizen to religious freedom, anywhere in the country, as enshrined in the Nigerian Constitution and the UN Declarations and Conventions. States exist in democratic societies primarily to guarantee, protect and promote the material well-being, security and safety, rights and freedoms of citizens, and not to foist a religious dogma and oppression on them. What can at least be said of the Nigerian state and governments is that they fail to do what they are

16. Ibrahim Mu'azzam and Jibrin Ibrahim 2000 "Religious Identity in the Context of Structural Adjustment in Nigeria" in Jega, A. (ed.) *Identity Transformation and Identity Politics under Structural Adjustment in Nigeria* Nordiska Afrikainstitutet, Uppsala and Centre for Research and Documentation, Kano

obliged to do – guarantee, protect and promote the welfare rights and security of citizens - but instead do what they are forbidden to do – exploit, oppress and divide the citizens.

FEDERALISM AND THE MANAGEMENT OF
ETHNICITY IN NIGERIA:
THE 1999 CONSTITUTION IN PERSPECTIVE

by

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Introduction

The idea that constitutions can be used to manage ethnicity and ethnic conflicts is a fairly recent one.¹ It represents one of the major paradigmatic gains of the shift in constitutional discourse and development from the formalistic, philosophical and rather static formulations of the legal-constitutional perspectives that dominated the field for a long time, to the more inclusive, adaptive, dynamic and problem-solving perspectives that emphasize the political, social, economic and global aspects of constitution-making and operation. The development of these latter perspectives owes a lot to the search for appropriate political and constitutional 'solutions' and 'settlements' for Third World countries caught in the throes of decolonization, chronic and protracted conflicts, civil war, crises and instability. Divided multiethnic states, which have a notorious tendency to be unstable and to defy conventional political solutions, constitute the most problematic category of states in this regard.

Processes of political and economic reforms and change including, most notably, liberation struggles, democratization and democratic transitions have also offered opportunities for

1. With regard to Nigeria, perhaps the earliest examination of the subject is John A.A. Ayode: "Ethnic Management in the 1979 Constitution", *Publius: The Journal of Federalism*, Vol. 16, No 2, 1986. Also see Adele Jinadu: "Federalism, the Consociational State and Ethnic Conflict in Nigeria," *Publius: The Journal of Federalism*, Vol. 15, No 1, 1985.

constitutional reform and innovation in part because the processes are driven by conflicts and other serious problems. Thus, notions of executive and territorial power sharing, post-war and post-conflict settlements and, with them, preventive conflict measures, conflict transformation and management, all of which entail constitutional reinventions have become commonplace as drivers of transformatory processes. In Africa certainly, constitutional reform, involving in most cases, the adoption of new constitutions and new constitutional instrumentalities, has become the focal point of processes of political transition and transformation. This has generated some excitement about the efficacy of constitutions as problem solving and specifically conflict-management devices in spite of the poor record of constitutionalism on the continent.²

But do constitutions really manage or resolve conflicts? How amenable, for instance, are ethnic conflicts to constitutional solutions? Are there universal principles that govern the use of constitutions as conflict management devices? How is the efficacy of constitutional solutions to be determined? Are constitutional solutions means to ends or ends in themselves? These and many other questions are likely to engage scholars of constitutionalism for a long time to come; but what is fairly obvious is that answers will depend on the choices and performances of individual countries with constitutional solutions. In the absence of scientifically tested and predictable frameworks and outcomes, the effectiveness of particular constitutional forms is something that cannot really be dealt with in a prescriptive or normative manner.

This means that the spectre of experimentation and innovativeness that now characterizes constitutional discourses is likely to remain open-ended. It is against this background, whose

2. For a highly optimistic view of constitutional developments and their inherent 'curative' elements, see Julius Ihonvbere: *Towards a new Constitutionalism in Africa*, Occasional Paper Series No 4 (London: Centre for Democracy and Development, 2000).

key point is that each country's experience is the most crucial determinant of the constitutional order and solutions that best suit its circumstances, that the management of ethnicity under the 1999 Constitution of the Federal Republic of Nigeria is examined in this Chapter. The Chapter begins with an overview of the federalism-ethnic management nexus, which is generally believed to be at the core of Nigeria's adoption of the federal solution. The next section examines the nature and efficacy of the federal solution embodied in the 1999 Constitution against the backdrop of the debilitating and state-threatening ethnicity-related problems that propelled Nigeria's transition from the quagmire of endless military-managed transitions. The third and final section presents the conclusions of the Chapter.

The Federal Solution and the Constitutional Process in Nigeria: A Conceptual Overview

It is generally agreed that the management of Nigeria's (ethnic, regional, religious, and cultural) diversity and the conflicts that ensue from it is hinged on the acclaimed efficacy of federalism as a model of political accommodation and power sharing, as well as a cure for micro-nationalism.³ This was as true for the British colonial authorities who built the administrative and political infrastructure for federalism, as it has been for generations of the Nigerian political elite for whom federalism offers "a system of opportunities" that reinforces access to the state, which is the main instrument of material accumulation and reproduction.⁴ This class orientation is most evident in areas of Nigeria's federal experience that have to do with control of state power, control

3. See, amongst others, Eghosa E. Osaghae: "The Federal Solution and the National Question in Nigeria" in Abubakar Momoh & Said Adejumo, ed. *The National Question in Nigeria* (Aldershot: Ashgate, 2002); Rotimi T. Suberu: *Federalism and Ethnic Conflict in Nigeria* (Washington DC: United States Institute). For Peace, 2001); J. Isawa Elaigwu and Victor A. Olorunsola, "Federalism and Politics of Compromise," in D. Rothchild and V.A. Olorunsola, ed. *State versus Ethnic Claims: African Policy Dilemmas* (Boulder: Westview Press). See Billy Dudley: "Federalism and the Balance of Political Power in Nigeria," *Journal of Commonwealth Political Studies*, Vol. 4, 1966.

and sharing of resources, and creation of states and local governments. It also underlay past interventions by the military section of the political class and the centrist inclinations of political processes. Not surprisingly, these are some of the areas that have generated tension and conflict in the country. It is the extent to which federalism or, more specifically, the type of federalism operated at any point in time, has facilitated or failed to facilitate the management of the tensions and conflicts that has labeled it appropriate or inappropriate, suitable or unsuitable.

This goes to the very heart of the sociological perspective of federalism that provides the conceptual lens for this chapter. The perspective emphasizes the dynamic, adaptable and problem-solving nature of federalism because as Livingston, its foremost champion, argued long ago, federalism is not simply a function of constitutions, but the nature of society served by the constitutions. Consequently, "as the nature of society changes, demands for new instrumentalities⁵ are created and these are met by changing or abolishing old instrumentalities and establishing new ones in their places."⁶ The essence of Livingston's perspective is not to divest federalism of its conventional definition as a system of government in which power is shared between two levels of government, but to emphasize its problem-solving utility in countries troubled by strong centrifugal forces.⁷ Indeed, Daniel Elazar has differentiated federal systems "in which the purpose is to share power broadly" such as the USA, Germany and Switzerland, from those of the Livingston perspective, in which federalism is a means to an end, the

5. By instrumentalities Livingston means either clauses in the Constitution or the manner in which Constitutional forms are employed, including the ways in which the Constitution and its institutions are operated. See William Livingston, "A Note on the Nature of Federalism," *Political Studies Quarterly*, Vol. LXII, No. 2, .1952, p. 9.

6. *Ibid*, p. 53.

7. For an elaboration of the meaning and varieties of the federal solution, see Eghosa E. Osaghae: "The Federal Solution in Comparative Perspective," *Politeia*, Vol. 16, No 1, 1997.

purpose being "to give individual national communities a share in the power of the state."⁸

To a large extent, the Nigerian experience is supportive of Livingston's assertion because, as Rotimi Suberu has rightly pointed out, the country "is perhaps the paradigmatic case of the innovative use of federal principles and institutions to accommodate diverse communal constituencies within the power structure of the state."⁹ Between 1954 when the country formally adopted a federal constitution and 1999 when the Fourth Republic was inaugurated, the country had a total of seven constitutions (1954, 1960, 1963, 1979, 1989, 1995 and 1999). Following Livingston's argument, we would assume that constitutional changes and reforms were necessitated by the changing nature of demands from political society, which was indeed the case.

This explains the varying degrees of federalism, including different instrumentalities, embodied in the constitutions. More specifically, the degrees and instrumentalities have oscillated between the region-centred or de-centralist federal system of the 1950s and 1960s, which was largely a response to the demands by the major ethno-regional groups for regional autonomy of the time and the nation-centred or highly centralized federal system of the post-civil war period, which was congruent with the dictates of military rule as well as demands for greater integration and national cohesion. The transition from the former to the latter was presumably the product of the hard lessons of the 'divisive federalism' that followed the extreme regionalism of the 1950s and 1960s, which is commonly adduced as the main reason for the civil war (1967-1970).¹⁰ The overriding concern with and clamour for integration and cohesion provided the

8. Daniel Elazar, "Federalism and Consociational Regimes," *Publius: The Journal of Federalism*, Vol. 15, No 2, 1985, p. 33.

9. Suberu: *Federalism and Ethnic Conflict in Nigeria*, *op cit*, p. 1.

10. For various perspectives of the war, see Eghosa E. Osaghae, Ebere Onwudiwe, and Rotimi T. Suberu, ed. *The Nigerian Civil War and its Aftermath* (Ibadan: Programme on Ethnic and Federal Studies, University of Ibadan, 2002).

opportunity for post-war military governments to design forms of federalism that not only suited the imperatives of military organization¹¹, but also sought to correct some of the perceived ills of the Nigerian state and society.

Indeed, the corrective agenda, which was the major justification for military intervention and prolonged rule, became the fulcrum of transition-to-civil rule programmes. Typically, the agenda involved producing constitutions that embodied new instrumentalities which sought to correct the 'mistakes' of previous constitutions and political arrangements, especially in the area of managing ethnicity. The 1979 Constitution, which was the first by the military after the civil war, was prototypical in this regard. It introduced such new instrumentalities as the presidential system of government, federal character principle, recognition of only parties with a national as opposed to regional, ethnic or sectional complexion and elevation of local government as the third tier of government with constitutionally guaranteed powers. These were in consonance with the objectives articulated by the then Head of State, General Murtala Mohammed, which basically had to do with preventing a recurrence of the divisive federalism of old and included elimination of cut-throat and winner-takes-all politics, discouragement of institutionalized opposition to the government in power and over-centralization of power in a few hands.¹²

Subsequent constitutions – those of 1989, 1995 and 1999 – sought improvements to the 1979 Constitution in the form of remedies to some of the persistent problems that threatened the stability and survival of the Nigerian state. For example, the

11. These basically had to do with the unfederal elements of the principles of military organization, namely, unity of command, centralization and hierarchical authority, but they also included the hidden agenda of regime legitimization, prolongation, self-succession, and perpetuation of 'military politics' pursued by various military governments.

12. See text of address to the Constitution Drafting Committee (1975) by General Murtala Mohammed in O. Oyediran, ed. *Survey of Nigerian Affairs, 1975* (Lagos: University Press, 1978).

1989 constitution introduced the 'recall system', which made it possible for electoral constituencies to recall "non-serving" or non-accountable representatives, while the 1995 draft constitution introduced a system of rotational presidents and multiple vice presidency, to ensure that most, if not all groups had access to power at the centre, which at the time had become the only determinate centre of power. The 1999 Constitution was basically a return to that of 1979 features with some notable amendments. Remarkably, for reasons that had to do with the inherent instability of military regimes in general and the devious self-succession agenda of the heads of state at the time, the Constitutions of 1989 and 1995 were stillborn. They were never operated though the innovations contained in them remain important points of reference for discussions of constitutional reforms in the country.

Thus, although it is generally agreed that "military federalism"¹³ was an aberration for the reason that its core elements of unity of command, centralization and hierarchical authority negated federal principles, yet many of the instrumentalities that have been cited as strengtheners of the federal solution in Nigeria and recommended for countries with similar problems, including the federal character principle, local government autonomy and creation of more states and local governments, were introduced by military governments.¹⁴ The point should nevertheless be made that the efforts of military

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13. For an elaboration of the aberrant military federalism, see J. Isawa Elaigwu: "The Military and State-Building: Federal-State Relations in Nigeria's Military Federalism," in A.B. Akinyemi *et al.* (eds.) *Readings on Federalism* (Lagos: Macmillan for NIIA, 1979).
 14. For such positive evaluations of Nigeria's 'creative' federalism and its lessons for other federations, see Martin Dent: "Federalism in Africa, with special reference to Nigeria," in M. Forsyth, ed. *Federalism and Nationalism* (Leicester: Leicester University Press, 1989); Ladipo Adamolekun and John Kincaid: "The Federal Solution: An Assessment and Prognosis of Nigeria and Africa," *Publius: Journal of Federalism*, Vol. 21, No 4; and Eghosa E. Osaghae, "The Nigerian Federal Experience: What Lessons for South Africa?" in H. Kotze ed. *The Political Economy of Federalism in South Africa* (Stellenbosch: Centre for International and Comparative Politics, University of Stellenbosch, 1995).

administrations were basically geared towards strengthening a highly centralized (some would say over-centralized) federal system. Military politicians believed this was the solution to the chronic problems of division and instability, and were probably right to think so, but at the same time, it was clear that the problems were exacerbated by the excesses of authoritarian military rule. The introduction of new instrumentalities that sought to deal with matters arising from over-centralization, of which the federal character principle and creation of states were the most notable was, therefore, literally a case of the military cleaning up its own mess.

To close this section, let us return to the conceptual question raised earlier about the ability of constitutions to manage conflicts, specifically ethnic conflicts. To the extent that federalism is considered a solution to the management of diversity, to that extent can a federal constitution be regarded as a device for managing ethnicity, ethnicity being the sum total of adversarial and cooperative relations that arise from interactions among members of different ethnic groups in their pursuit of conflicting interests. Although the tendency is for definitions of ethnicity to focus on adversarial relations, which include intra-group, inter-group and against-state conflicts, demands for equitable distribution of resources, and ethno-nationalism (assertion of a right to self-determination to separatist agitation and secession), presumably because they pose the greatest dangers to the political system, the reality is that they do not exhaust the gamut of ethnicity, and ethnic conflicts are not inevitable.

Ethnicity can also be harmonious and cooperative. It is this often unacknowledged dimension of ethnicity that provides the key to its management, although it is evident that constitution makers see ethnicity in largely negative terms as something to be prevented and if possible, eradicated. What liberal constitutions try to do in plural or divided societies is to provide the enabling environment for harmonious ethnic relations through

encouragement of inter-ethnic collaboration and integration on the one hand and regulation of competition and other conflict-generating sources on the other. Efforts at ensuring the relative autonomy (some would say neutrality) of the state, human rights, to ensure a level playing field for all competing interests, the creation of multiple centres of power to address the vicissitudes of conflicts and avoid a concentration at the centre, which demonstrably raises the stakes of politics, and specific provisions that promote national integration through inter-group marriage for example, are some of the notable elements of such enabling environment. The overall objective is to prevent dangerous adversarial relations and conflicts and, where they ensue, to keep them within manageable limits. While these elements are somewhat general and are to be found in most liberal constitutions, federal constitutions have additional instrumentalities as necessitated by the circumstances, needs and problems faced by the society requiring a federal solution at any point in time. Thus, in a comparative study of ethnic conflict resolution in Uganda and Nigeria, the Ugandan scholar, Yolamu Barongo, has attributed Nigeria's relatively more effective management to the ability of federalism to create multiple centres of power that prevent conflicts from converging at the centre by deflecting them, as it were, to regional and local centres of power.¹⁵

Experiences with constitutional solutions, however, show that while constitutional instrumentalities are necessary tools for managing diversity, they are by no means sufficient. In fact, constitutions and government policies based on them have been known to precipitate conflicts, though, more often than not, it is the abuse, mismanagement or flouting of constitutional provisions and high-handedness on the part of the state, more than the provisions themselves, that are at fault. For example, a constitution

15. Barongo, "Ethnic Pluralism and Political Centralization: The Basis of Political Conflict," in K. Rupesinghe, (eds): *Conflict Resolution in Uganda* (Oslo: PRIO, 1989).

might protect minorities in the best manner possible (group rights, reverse discrimination and so on), but if state power-holders fail to effectuate the safeguards, there is no way the constitution can serve as an instrument of conflict regulation. The point that bears emphasizing is that constitutions do not exist in a vacuum. They are embedded and operated within *real* political, historical, cultural, sociological and economic contexts and their viability and effectiveness depend on how relevant and conducive to this more underlying terrain the constitutional order is.¹⁶ But more than that, constitutions are least likely to work in the absence of a culture of constitutionalism, that is, a culture that respects and upholds the rules of the game. The experience of most African states where constitutionalism has remained underdeveloped underscores this point. In summary, constitutional solutions have to be effective in theory and practice. As it were, elegant and adequate instrumentalities in themselves do not guarantee effectiveness; they have to be respected and complied with in practice if the instrumentalities are to be useful.

The Case of the 1999 Constitution Background

Following the conceptual frame outlined above, which links the suitability and efficacy of a federal constitution to the nature of the society it serves, an examination of ethnic management under the 1999 Constitution has to relate it to the nature of the political society that the Constitution is supposed to serve. It is only on the basis of its congruence with the demands that the efficacy of the constitution can be gauged. This is more so that most views on the constitution have been critical of what are called its inadequacies, impropriety and illegitimacy.¹⁷ The Constitution is

16. See P. Hanafin and M.S. Williams, ed. *Identity, Rights and Constitutional Transformation* (Aldershot: Ashgate, 1999).

17. Civil society constituents, many of which took part in the long-drawn struggles to oust the military, have been in the forefront of these critical perspectives. They demand a people-based and process-driven process of constitutional reform. See, for example, Otiye Igbuzor: and Ololade Bamidele (eds): *Contentious Issues in the Review of the 1999 Constitution* (Lagos: Citizens' Forum for Constitutional

flawed on the grounds of the non-participatory, non-consultative and secretive process of its writing and adoption (which gives the lie to the "We the people..." clause in the preamble), and the highly centrist (read as non-federal) character of its power configuration. The import of the latter criticism is simply that because the constitutional instrumentalities retain elements of military federalism, the Constitution is out of sync with the clamour for "true federalism" of the region-centred and confederal trajectory. To determine the veracity of these claims, it is necessary to examine the background to the 1999 Constitution. It is only after this that the efficacy of the devices for managing ethnicity in the Constitution can be meaningfully analyzed.

As we saw earlier, the military made optimal use of the opportunities created by the imperative of national cohesion in the aftermath of the civil war to introduce forms of integrative federalism. Although in reality integrative federalism was interest-begotten and self-serving, considering the principles of military organization that governed it, Nigerians were willing to sacrifice the desecration of core federal principles in order to build a more united country. Thus, the powers of the states were whittled down and unilaterally taken over by the federal government, which became the only determinate centre of power; the fiscal competences of the states, including greater control over resources and the use of the principle of derivation in the allocation of federally collected revenues, were eroded; the states were reduced to peripheries and mere administrative agents of the central government.¹⁸ These were all done in the name of strengthening the federal solution.

But the scenario changed with the sacking of the Second Republic and the descent of military rule to unprecedented levels

Reform, 2002); Otiye Igbuzor, *A Critique of the 1999 Constitution Making and Review Process in Nigeria*, CFR Monograph Series No 1 (Lagos: Citizens' Forum for Constitutional Reform, 2002).

18. Eghosa E. Osaghae, "The Status of State Governments in Nigerian Federalism," *Publius: The Journal of Federalism*, Vol. 22, No 3, 1992.

of authoritarianism and an instrument of personal and exclusionary sectional (ethnic, regional and religious) rule in the 1980s and 1990s. The nation-centred trajectory of federalism subsequently fell into "deepening crisis" and its suitability was, as a result, questioned and challenged.¹⁹ The annulment of the June 12 1993 presidential election was the turning point in this process for a number of reasons. First, there were those who believed that the election which, from all accounts, was won by Chief M.K.O Abiola, a Yoruba from the southwest, was annulled to ensure that power did not leave the north whose elite had continuously dominated post-independence ruling coalitions. Since military rule had largely become an instrument for perpetuating this dominance, the annulment seemed to reinforce this notion.

Second, the annulment showed clearly that the politicized segments of the military were reluctant to relinquish power. Third, the separatist sentiments that followed the annulment and the seeming inability of the central authorities to handle the crisis it precipitated suggested that the extant federal instrumentalities could no longer meet the challenges posed by the changes in the nature of demands from political society which, like those of the 1950s and 1960s, now sought greater autonomy for the constituent units to prevent complete takeover by so-called hegemonic forces. A similar situation had arisen in 1983 following the landslide victories of the National Party of Nigeria in federal and state elections, which dispossessed the other major ethno-regional parties (the Unity Party of Nigeria and Nigeria People's Party) of their strongholds. Then, southwest politicians led the agitation for confederation as a way of countering what

19. See A. Olukoshi and O. Agbu: "The Deepening Crisis of Nigerian Federalism and the Future of the Nigerian State," in A. Olukoshi and L. Laasko, (eds): *Challenges to the Nation-State in Africa* (Uppsala: Nordiska Afrikainstitutet, 1996).

was regarded as an attempt by a section of the northern elite in the NPN to lord it over the rest of the country.²⁰

These were the circumstances that propelled the ethnic, regional and religious conflicts and mobilizations as well as the agitations for political restructuring, sovereign national conference, true federalism, resource control by constituent units, and so on.²¹ The democratization process, which involved struggles against military rule and demands for state reconfiguration, provided the vents for long-drawn grievances and pent up anger of various ethnic claimants. This was how political organizations with discernible ethno-regional bases, notably the National Democratic Coalition (NADECO), which was closely affiliated with *Afenifere*, the pan-Yoruba sociopolitical group, Eastern Mandate Union, United Middle Belt Congress, Movement for the Survival of Ogoni Peoples, and the Northern Elders Forum, became major actors in the democratization process. There were at least three categories of ethno-regional demands. First were the claims involving the historically major ethno-regional actors which this time pitched the Yoruba southwest elites in particular and the south in general against the Hausa-Fulani/Northern elites. At issue was equitable access to and control of the federal government.

If the northern elites were not willing to relinquish power or let it rotate, then the region-centred trajectory of federalism of the 1950s and 1960s, with the 1963 Constitution as reference point, had to be reinstalled to mitigate the effects of domination. The more extreme variant of agitations in this category advocated confederation and secession. Second were the uprisings of the oil-rich Niger Delta minorities (Ogoni, Ijaw, Urhobo, Isoko, etc) to protest their continued marginalization from the political and economic mainstream, demand compensation for past and

20. Eghosa E. Osaghae, "Considerations on the Confederation Debate in Nigeria" *Plural Societies*, Vol. 20, No 1, 1990.

21. See Kunle Amuwo *et al*, (eds): *Federalism and Political Restructuring in Nigeria* (Ibadan: Spectrum Books, 1998).

continuing environmental degradation and other hazards associated with the oil industry, as well as greater share and control of the revenue accruing from oil. In the third category were the more general demands for access and group rights to equal treatment in the distribution of resources including the citing of federal establishments or what is known as 'federal presence' in Nigeria, and representation in the bureaucracy, military, and other government institutions. It was in this general context that various groups sought to redress alleged marginalization, domination and exclusion.

The tension generated by the various agitations and mobilizations due largely to the uncompromising manner in which they were presented was so intense that the disintegration of the country could not be ruled out. The decision to hurriedly terminate military rule in May 1999 was partly in realization by influential military elites and their civilian allies that the stakes of continued military rule had become too high. The return to civil rule was therefore a salvaging act, and the mechanics of the transition were tailored to this end. Foremost amongst these was the rotational principle of "power shift", by which the political elite agreed to have a southern – specifically a southwestern – president as a form of retribution for past lopsidedness in the control of state power and compensation for the 'injustices' of the annulment of the 1993 presidential election. But other critical issues relating to the reconfiguration of the federal state, citizenship, the rights of states, local governments and ethnic groups as constituent units of the federation, and the problems of the Niger Delta minorities remained. In the past, the resolution of these issues would have been the main lever of constitution-making. But the transiting military administration of General Abdulsalami Abubakar appeared too frightened of disintegration to throw open the process. What it did was to tinker with and adapt the 1979 Constitution to the emergent challenges the way the administration deemed fit. This was very much unlike the approach to transition constitution-making by previous military

governments, which made problematic political issues the fulcrum of reform and sought to address them in relatively open and participatory ways.²²

In the circumstances, the 1999 Constitution, true to what its critics allege, failed to respond to the political dynamics of the time. This was especially true of the federal configuration: it provided for a slightly modified form of military federalism in which the federal government remained an essentially imperial authority. This, at a time when there were strong agitations for political restructuring and true federalism complete with reduced central powers especially in fiscal relations, wide-ranging powers for state governments, including control of resources and state police; and at a time when aggravated citizenship contestations and violent conflicts involving 'indigenes', 'non-indigenes', 'settlers', and so on, needed to be urgently resolved. The fact that the constitutional process was flawed does not however preclude an examination of the ways in which the 1999 Constitution sought to manage ethnicity. As it were, the instrumentalities may have been inadequate or inappropriate, but they did exist at all.

The Management of Ethnicity

As with all other constitutions in Nigeria since 1954, the mainstay and framework of ethnic management in the 1999 Constitution are found in federalism. So, what is the nature of federalism in the constitution? It is basically of the nation-centred trajectory, which somehow subordinates state governments to the federal government which is, by implication, the dominant and determinate authority. The indicators of the dominance of the centre include the wide-ranging powers allotted to it in the long list of items in the exclusive legislative list (68 items), which include the regulation of political parties, police, and other government security services established by law; the open-ended

22. In the past, there had been Constitution Drafting Committees, Constituent Assemblies, Study Groups, the Political Bureau, and Constitutional Conferences.

clause of that list which gives the federal government power over "Any matter incidental or supplementary to any matter mentioned in this list;" the superintending roles assigned to the National Assembly on many matters in the concurrent legislative list; the ambiguous provisions on local government which give the National Assembly ample room for meddling in what should ideally be a state matter; the unitary structure of the judiciary which places state judiciaries under the control of the National Judicial Council; and the 'imperial' powers over resources and fiscal relations.²³

For example, although allocation of revenue, etc. is listed under the concurrent list, the Constitution empowers the National Assembly to make provisions for the division of public revenue among the tiers of government and for grants or loans from and the imposition of charges upon the Consolidated Revenue Fund or any other public funds of the Federation or for the imposition of charges upon the revenue and assets of the Federation for any purpose *notwithstanding that it relates to a matter with respect to which the National Assembly is not empowered to make laws.*²⁴ (emphasis added).

Thus, although the Constitution confers residual powers on state governments, which in the long run has the potential for tilting the balance in their favour, the authority of the states is highly constrained by the enormous power wieldable by the federal government, especially the president who is the pivot of central authority.

In addition to the areas of central supremacy already mentioned, the president is empowered to declare a state of emergency and take over control of any state/section of the country where public order and safety have broken down (section 305), while the National Assembly has the power to unilaterally

23. It is instructive that mines and minerals, including oil fields, oil mining and natural gas, which are the country's main revenue earners and economic mainstay, are placed under the exclusive list.

24. *Second* Schedule, Part II A 1(b) of the Constitution.

alter any of the provisions of the Constitution (section 9), which negates the federal principle of shared and coordinate power. Even with regard to supposedly inter-governmental bodies on which states are entitled to statutory representation (the national Council of State, Federal Character Commission, Federal Civil Service Commission, National Economic Council, National Judicial Council, Nigeria Police Council, Revenue Mobilization and Fiscal Commission), their designation as "Federal Executive Bodies," and the fact that state representatives in many of them are appointed, albeit on the recommendation of state governments, give a slant of federal control. The case of the Revenue Mobilization and Fiscal Commission is instructive. State commissioners are appointed by the president, and function as federal officials rather than state representatives.

Another important parameter of the degree of centralization of a federal system is the structure of political parties and party system.²⁵ To all intents and purposes, the 1999 Constitution forbids the existence of non-centralized and supposedly non-national parties. This is clearly to be seen in the placement of the regulation of political parties under the exclusive legislative list as well as the rules on the registration and operation of parties in sections 221-228, whose effect is to make it almost impossible for parties with non-centralized (read as 'sectional') structures to operate. In particular, party headquarters are required to be situated in the Federal Capital Territory, Abuja. This highly centrist orientation, which is a legacy of military federalism, reinforces the over-centralization of the federal structure, and has had largely negative effects on inter-governmental relations. It has limited initiatives by state and local governments and tied the affairs of state and local governments too closely to the whims and caprices of party executives at Abuja. This has been especially true of relations between the People's Democratic Party (PDP)-controlled government and PDP-controlled states.

25. See Eghosa E. Osaghae: "A Reassessment of Federalism as a Degree of Decentralization," *Publius: The Journal of Federalism*, Vol. 20, No 1, 1990.

The crisis that rocked Anambra state following unsuccessful attempts by powerful chieftains of the PDP to oust the state governor in 2003/04 was complicated by the overbearing power and influence of the Abuja headquarters of the party.

Overall, the over-centralized nature of the federal system embodied in the 1999 Constitution has heightened the stakes of ethnic politics and weakened the capacity of the system to deal with the ensuing tensions and conflicts. The latter is largely a consequence of the decline in the powers of the states. Because power and resources including, most importantly, police and security establishments, are concentrated in the hands of the president and the federal government, the capacity of state governments to manage conflicts has reduced drastically. Without resources and police forces (or control over federal police), state governments have to rely on federal authorities to deal with even the most localized and particularistic communal conflicts. Between 1999 when the Constitution came into being and 2003 when the first term of civilian governance ended, 'federal might' was required to quell every manner of conflict. The cases of Ife-Modakeke, Aguleri-Umuleri, Odi, Zaki Ibiam, Warri and other flashpoints of the Niger Delta, illustrate this point very well. The entry of these conflicts into national consciousness, partisanship, lack of professionalism and ineffectiveness of security agencies, further exacerbated ethnic tensions. If the federal solution is to be meaningful the way Yolamu Barongo has analyzed it, namely by helping to de-concentrate the management of conflicts (see above), it goes without saying that the capacity of states (and local governments) to cope with conflicts has to be strengthened.

In terms of stakes of politics, a key problem is the obsession of ethnic claimants, especially those from the major ethno-regional groups, with capturing the presidency and federal government. This is partly attributable to the awesome allocative powers enjoyed by the president and the fact that the other tiers are highly dependent on the federal government. Although this

has not made competition for state governorship and local government chairman positions less fierce, states and local governments being centres of power in their own rights, the do-or-die struggles to control the federal government have produced the greatest tensions and anxieties in the country.

The federal character principle, which was first introduced in 1979, remains the most notable and specific constitutional instrumentality for dealing with the tensions and conflicts generated by the fierce contestation for power and resources in the country. It may in fact be regarded as the most innovative response to the problems of over-centralization. Briefly stated, the principle is an instrument of distributive justice that aims at preventing the domination of government and its agencies by people from one or a few ethnic or sectional groups by ensuring that appointments in government at the federal, state and local levels are representative of the kaleidoscope of the country's diversity.²⁶ Even though the application and effectiveness of the principle has been dogged by controversies over its negation of the principle of merit and the alleged slowing down of the progress of more developed groups, it has nevertheless helped to regulate competition in the composition of the cabinet, appointments and promotions in the public service including the armed forces, admissions into tertiary institutions and the location/distribution of federal establishments.²⁷

The principle has also been of immense benefit to the otherwise disadvantaged citizens from relatively poorer and less developed parts of the country in the competition for power and resources, although no special provisions are made for people from marginalized minority groups. To further ensure the

26. See section 14(3) and (4) of the 1999 Constitution

27. On the workings and problems of the principle, see the various chapters in the section on "Federal Character and Power Sharing" in Kunle Amuwo *et al*, *op cit*; Peter P. Ekeh and Eghosa E. Osaghae, (eds): *Federal Character and Federalism in Nigeria* (Ibadan: Heinemann, 1989); and Eghosa E. Osaghae, "The Complexities of Nigeria's Federal Character and the Inadequacies of the Federal Character Principle in Nigeria," *Journal of Ethnic Studies*, Vol. 16, No 3, 1988.

effectiveness of the principle, the 1999 Constitution provides for the Federal Character Commission whose functions include working out an equitable formula for the distribution of all cadres of posts in the public service; promotion, monitoring and enforcement of compliance with the principle of proportional sharing; and taking legal action against institutions in breach of the principle.²⁸ One problem the federal character principle has not been able to deal with however, is the regulation of access and succession to the office of the President, which from all that has been said, is the most important object of political competition in the country. Its application says nothing about proportional sharing of access to the office. The result is that even when the principle has been effected to the letter, it does not obviate perceptions of domination, exclusion and marginalization that emanate from patterns of executive incumbency.

It is partly as a result of the inadequacy of the federal character principle in this critical area that major political parties and segments of the political class have, since the Second Republic, taken the lead in devising alternative or additional strategies for regulating competition for top political positions and even distribution of spoils. These mainly involve 'zoning' and 'rotational' arrangements, which are designed to give guaranteed access to politicians from the various ethno-regional zones of the country. The 'power shift' arrangement under which Olusegun Obasanjo, a Yoruba from the southwest, became President in 1999 apparently in atonement for the sin of the annulment of the June 12, 1993 presidential election, is a byproduct of such formulae. Although the arrangements have not worked well in part because of the tendency of members of the political class to flout the rules of the game when they do not serve their interests, elements of zoning and rotation seem to have become entrenched as integral parts of the federal political

28. Third Schedule, Part 1 C, sections 7-9 of the 1999 Constitution.

culture whose hallmark is the development of a culture of entitlement by competing groups.²⁹

The division of the country into six geopolitical zones, for the purpose of sharing power at the federal level, which was one of the major decisions of the 1995 constitutional conference, has boosted the consolidation of this culture. Members of the political class who consider these devices inadequate have however recommended other remedies to strengthen power sharing practices. Notably, a return to the parliamentary system, which was practiced in the First Republic and is believed to be more suitable than the presidential system for balancing political interests and a system of multiple vice-presidency have been canvassed.

Let us now examine other devices for managing ethnicity in the 1999 Constitution. This will be done under two categories: those devices that directly respond to the aggravated ethnic problems of the 1990s; and those that seek to strengthen the relative autonomy or neutrality of the state, including the promotion of equitable access and opportunities to all citizens.

Responses to the Aggravated Ethnicity of the 1990s

In concrete and specific terms, the most notable interventions to address the aggravated ethnic conflicts of the 1990s were made in the context of the political process. In this regard, the decisions of the 1995 constitutional conference convened by the General Abacha administration were fundamental to charting the course, as it were. Amongst others, the conference divided the country into geopolitical zones for the purposes of power sharing, laid the groundwork for the principle of rotational presidency that culminated in 'power shift' in 1999 and dealt at length with issues of injustice and marginalization that provoked the violent

29. For an elaboration of the evolving federal political culture in Nigeria, see Peter P. Ekeh: "The Structure and Meaning of Federal Character in the Nigerian Political System," in Peter P. Ekeh and Eghosa E. Osaghae, (eds): *op cit.* Also see Adigun Agbaje: "The Ideology of Power Sharing: An Analysis of Content, Context and Intent," in Kunle Amuwo et al, *op cit.*

uprisings of the Niger Delta minorities. Of these, only the increment in the proportion of the Federation Account, which the 1995 conference considered crucial to the resolution of the oil resource-based Niger Delta question, found its way into the 1999 Constitution. Thus, while admonishing the National Assembly to apply the allocation principles of population, equality of states, internal revenue generation, land mass and terrain, in the sharing of centrally collected revenues in the Federation Account (section 162 (2)), the following exception is made:

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.

The greater weight assigned to the derivation principle addresses one of the major grievances of the Niger Delta minorities. Prior to the advent of the military, the erstwhile regions reaped optimal benefits on account of resources derived from their territories. But the weight assigned to derivation thereafter declined to as low as 1.5 per cent in the 1980s, a development the minorities rightly regarded as grave injustice.³⁰ Although it did not resolve the contentious issues of resource control raised by the Niger Delta states as further agitations since 1999 clearly show, the increased weight given to derivation was a significant 'victory' for the aggrieved groups. Together with the establishment of special Commissions to address the developmental problems of the oil-rich region, the most recent being the Niger Delta Development Commission, the state has

30. For a good analysis of the derivative principle debate in historical perspective, see Gini F. Mbanefoh and Festus O. Egwaikhide: "Revenue Allocation in Nigeria: Derivation Principle Revisited" in Kunle Amuwo *et al*, *op cit*. A more critical perspective that addresses the contradictions between derivation and equity is presented in Eskor Toyo: "Revenue Allocation and the National Question" in Abubakar Momoh and Said Adejumo, *op cit*.

been more sensitive and responsive to the problems of the Niger Delta than ever before. Understandably, considerations of equity and distributive justice to other less resource-endowed groups have placed necessary limits on the extent to which the state can go. This is because as Eme Awa argued long ago, "The philosophy of federalism would indeed be a barren one if it implied...that the rich could become richer and the poor poorer. The idea of a balanced development is implied in the philosophy of federalism."³¹

The Character of the State

In liberal (pluralist) thought, which assigns an umpire role to the state in the regulation of the competition among people from different groups, the character of the state is believed to be fundamental to its ability to manage conflicts. In order for a state to serve as a credible agent of distributive justice and manager of conflicts, it needs to be legitimate, relatively autonomous and neutral. The philosophical basis of the 1999 Constitution draws heavily from these precepts, as spelt out in Chapter II under "Fundamental Objectives and Directive Principles of State Policy". Amongst others, the state is bound to principles of democracy, freedom, equality and social justice, participation by citizens in governance, representativeness of government and its agencies on the basis of the federal character principle, promotion of national integration, planned and balanced economic development, harnessing and distribution of material resources to serve the common good as well as the equality of rights, obligations and opportunities before the law. To further ensure the neutrality of the state, section 10 provides that "The Government of the Federation or of a State shall not adopt any religion as state religion," while Chapter IV presents the Bill of Rights to ensure equality of all. Finally, the independence of the judiciary is expected to guarantee the neutrality of the state.

31. Eme Awa, *Issues in Federalism* (Benin-City: Ethiope, 1976), pp. 64-65.

In practice, the autonomy of the state has been compromised in several ways, but only two are sufficient to make the point. One is the hierarchical structure of citizenship that manifests in discrimination against so-called non-indigenes by indigenes in communities, states and local governments in access to power, resources, rights and privileges, and the first and second order rankings of people from majority and minority ethnic groups. Many of the violent conflicts that the country witnessed in the period after 1999 were propelled by contestations over full and equal citizenship. State and local authorities, which pursue discriminatory and exclusionary policies against non-indigenes in the provision of rights and benefits, in spite of the fact that non-indigenes pay taxes and other obligations to them, contribute greatly to the problem. The fact that this happens in spite of the fact that the Constitution prohibits "discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties"³² and enjoins the state to provide adequate facilities and encourage free mobility of people throughout the federation and "secure full residence rights for every citizen in all parts of the federation"³³ suggests that the underdevelopment of the rule of law is a major problem. It also explains the tendency of members of aggrieved groups to resort to extra-legal and extra-constitutional means of seeking redress. Also, the absence of effective safeguards for 'non-indigenes' and minorities in the Constitution, such as sanctions against discrimination as well as the requirement that one or more of a citizen's forebears must come from "a community indigenous to Nigeria,"³⁴ have been conducive to the entrenchment of unequal citizenship. These problems should be addressed as part of the process of constitutional reform.

The second challenge to the impartiality and legitimacy of the state that has arisen since the commencement of the 1999

32 . Sections 15 (2) and 45 of the 1999 Constitution

33 . Sections 15 (3) a, 15(3)b and 41 (1).

34 . Section 25 (1)a.

Constitution is the adoption of Sharia by several northern states with dominant Muslim populations. Apart from endangering the security of non-Muslims in the states concerned and sharpening ethno-regional cleavages, which further complicate the problem of contested citizenship, the adoption of Sharia as official state religion calls into question the secularity of the state enshrined in section 10 of the constitution. Sharia is by no means new to Nigeria, and, like customary law, has been one of the ways of expressing the country's diversity. This is consistent with the federal principle of 'unity in diversity.' Accordingly, it has long been practiced in the core northern states. The 1999 Constitution simply respects a relatively settled issue in its provision for the establishment of a Sharia Court of Appeal in the Federal Capital Territory and for any state that requires it – just as it does for a Customary Court of Appeal in the FCT and states. But it is a different thing altogether when Sharia is adopted as state religion with the inherent dangers of discrimination, persecution and exclusion. Federal authorities adopted a cautionary approach to the explosive and highly divisive subject, believing it to be a politically motivated reaction to the loss of state power following power shift in 1999, and so far, the constitutionality of the religious regime has not been challenged. I believe Sharia is indeed a political statement of 'true federalism' calculated to enhance the bargaining power of the core northern elites in any re-negotiation of Nigerian federalism. As such, it should be an important item in any constitutional reform agenda in the country.

Conclusion

Against the backdrop of the aggravated conflicts, ethno-nationalism and hotly contested claims that characterized the terrain of ethnicity in the period leading up to the commencement of the 1999 Constitution, this chapter has shown that the federal arrangement enshrined in the Constitution is too centrist to cope with the challenges. In particular, the incapacitation of state

governments to manage conflicts, which provides the rationale for federal intervention in local conflicts, has evidently heightened the stakes of political competition among the various groups and denied the country the advantages of a multi-centre system of diversity management that a thoroughgoing federal system offers. The persistent clamour for more power for the states, especially in terms of fiscal autonomy and control over the police, the emergence of 'political Sharia' as it were and increased contestations over citizenship are some of the more immediate consequences of the contradictions between a non-centrist political society and an over-centralized federal system. To a large extent, this federal structure is out of sync with the realities and demands of political society. This largely explains the persistent demands for constitutional reform by champions of ethno-regional interests and those who believe that only true federalism can successfully manage the problems of ethnic diversity. True federalism is not however defined by the extent to which the Constitution satisfies textbook prescriptions or mimics the provisions of so-called model federal constitutions. Rather, it is the extent to which its instrumentalities align with the demands of political society that defines the notion.

CONTEMPORARY ISSUES IN THE LOCAL GOVERNMENT SYSTEM UNDER THE 1999 CONSTITUTION

by

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Introduction

Through the ages, each political entity has pre-occupied itself with the system of government that has suited it best. The optimum may not be realized easily, except by trial and errors and even bloody revolutions. In any case, what is important for the system evolved and adopted is the provision of good governance, security and life more abundant for the citizens. The political arrangement may be unitary, confederal or federal, but in each case, there is always emphasis on the nearness of government to the people. This is why in any system adopted, there is always that tiny unit of the machinery of government closest to the people. In common parlance, this unit is called the local government Council.

In Nigeria's Constitutional/administrative arrangement, the Local Government Council is referred to as the third tier of Government, others being the Federal and State governments. Presently, Nigeria is under a democratic system of government in which all the tiers of government are run or administered by representatives of the people. In nation's political development, despite its administrative and political importance, Local Government has suffered to the extent that it is the least empowered financially, administratively and politically. This is not surprising. In over forty-four years of independence, Nigeria has witnessed democratic rule, encompassing the operation of Local Government Councils, for only fifteen years. In fact what seems to have characterised that level of governance /administration in the post-independence era is the instability of

its administration. During the twenty-nine years of military rule, local government administration was unstable. Even out of the fifteen years of democratic rule, Local Government Councils were democratically managed for just over five years and a few months.¹

The result of this unfortunate state of things is that the Local Government Councils in Nigeria have not really developed politically and administratively. The sustenance of the present democratic dispensation is the only panacea to the development of that level of government. This chapter will examine some legal issues in local government administration under the 1999 Constitution of Nigeria.

What is Local Government?

Reacting to the instability, wretchedness and subservience of Local Government in Nigeria, the general opinion on it is summed up by a writer thus:

“Local government has always meant different things to different people. To the Nigerian politician, it served as a means of perpetuating political power; to the jobless in the rural area, election as a Councilor serves as a means of livelihood; to the economist, Local Government Councils are regarded as partners of the state Government in the development process; to many others, Local Government is synonymous with local extortion ... they collect the rates and taxes with no services rendered in return.”²

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- 1 1960 – 1965 during the first Republic and April 2004 to the present time.
 2. Ogunmade M.S.: “The Role of Local Government Councillors, Powers, and Limitations and Relationship Between Chairmen and Secretaries” in Oladimeji Aborisade ed. *On Being in Charge at the Grassroots Level in Nigeria*, Department of Local Government Studies, Obafemi Awolowo University (1989) p. 74.

This unfortunate opinion is caused by the historical antecedents of Nigeria's Local Government. Hope should not be lost, since the present dispensation will lay the much needed solid foundation for Local government administration in the country. Several definitions have been ascribed to Local government.

The United Nations once described Local Governments as:

“ A political sub-division of a nation or (in a federation) state which is constituted by law and has substantial control of local affairs including the power to impose taxes or to labour forces for prescribed purposes. The governing body of such an identity is elected or otherwise locally selected.”³

The Federal Government of Nigeria describes it as:

“Government at local levels exercised through representative councils established by law to exercise specific powers within defined areas.”⁴

The purpose of these “specific powers” is explained further by the Guidelines:

“These powers should give the Council substantial control over local affairs as well as the staff and institutional and financial powers to initiate and direct the provision of services and to determine and implement projects so as to

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3. *A Handbook of Public Administration* (United Nations Technical Assistance Programme) New York 1961, p. 63.
 4. *Guidelines for Local Government Reform*, Federal Government of Nigeria Lagos 1976 p. 1.

complement the activities of the State and Federal Government in their areas, and to ensure, through devolution of functions to these Councils and through the active participation of the people and their traditional institutions, that local initiative and response to local needs and condition are maximized.”⁵

Today, the Local government is used as a vehicle for development at the local level. History has however revealed that it inevitably developed from the system of indirect rule introduced by the colonialists to subjugate the natives. Aliyu T.A. quoted the words of Taubman Goldie that:

“If the welfare of the races is to be considered, if dangerous revolts are to be obviated the general principle of ruling on African principles through native rules must be followed for the present.”⁶

The main purpose of government is development and this can be accomplished by the other two levels, but Local Government is established so as to mobilize the local people for social and political development.⁷ The Political Bureau underscored this when it observed that:

“Local government is widely acknowledged as a viable instrument for rural transformation and for the delivery of social services to the people.”⁸

5. *Ibid* p.1.

6. Aliyu T.A.: “The Functions of Local Government Councils in Nigeria” in Oladimeji Aborisade ed. *Ibid* p. 55.

7. See Oyediran O. *ibid* p. 55.

8. *Report of the Political Bureau: Federal Government of Nigeria, 1987, p. 120.*

Section 7 (3) of the 1999 Constitution of Nigeria emphasizes this duty of development when it provides:

“It shall be the duty of a local Government Council within the State to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a Law enacted by the House of Assembly of the State.”

Brief History of Local Government

Local government administration, in the Western sense, did not really begin until after the amalgamation of the Northern and Southern protectorates in 1914. Before that date, the British had administered the Northern protectorate by the system of indirect rule. Their attempt to introduce same to the South particularly the Eastern part was unsuccessful. There later developed the Native Authorities in the Northern and Western areas comprising the traditional rulers and their chiefs. Modern exigencies necessitated the emergence of urban councils like Lagos, Ibadan, Calabar etc. which were constituted into government for local needs.

By 1950 when the Local Government Ordinance was enacted, County Councils, District Councils and Local Councils were established, each having its functions. From 1952 to 1960, Local Government witnessed a lot of changes and metamorphosis by the creation of Divisional, District and Local Councils at different periods. The idea of having democratic local councils, through elections was toyed with before independence particularly at self-government stages in the Regions.

At independence in 1960, the Regional Constitutions gave the respective Governors power to set up provincial administration by instruments. Through this power, Local Government Councils were established. The Governors also had

powers to dissolve such Councils on reasonable grounds. Through this power, councils constituted by opposing political parties were dissolved on flimsy or on not too clear grounds.⁹ Not only this, the local government which should cater for the needs of local population became agents of victimization and political persecution of political opponents.¹⁰ The Local Government or Native Authority Police which should have protected lives and properties soon became agents of oppression and suppression of political opposition. It will not be totally wrong to conclude that the local government administration in the first Republic was afflicted with corruption, oppression, victimization, ethnicity, thuggery and embezzlement of public funds. It was therefore not a surprise that disenchantment with the National or Regional governments, at the time, started from the Local Government level.

Local Government between 1966 and 1979

Following the military take-over of government in 1966, creation and dissolution of local Councils became the responsibility of the military Governors. Various types of local Councils were established under diverse names such as Councils, local authority, administrative area councils or area development. Appointments to run them were made by the Governors. There was uniformity as to functions but no uniformity as to designations. Some councils had sole administrators while some had council managers. Another confusing issue noted by that time was the taking over of local government functions and areas of economic activities by the State government. In fact, the local councils were nothing short of an extension of State Government administration. Due to the outbreak of the civil war in 1967 and the reconstruction that followed, the military government could not pay any adequate attention to the local councils.

9. *Ekundare v. Governor In Council* (1961) All NR 149.

10. *See Odukale v. Ibadan City Council* (1973) 3 UILR 490.

The need to revitalize the Local Government Councils prompted the Military Government to embark on their re-organization in 1976. The ills of the previous system were highlighted by the Government thus:

The defects of previous local government systems are too well known to deserve elaboration. The State governments have continued to encroach upon what would normally have been the exclusive preserves of local governments.

Lack of adequate funds and appropriate institutions had continued to make local government ineffective and ineffectual. Moreover, the staffing arrangements to ensure a virile local government system had been inadequate.

Excessive politicking had made even modest progress impossible. Consequently, there has been a divorce between the people and government at their most basic levels. In producing these reforms, the Federal Military Government was essentially motivated by the necessity to stabilize and rationalize government at the local level which necessitated the decentralization of some significant functions of State government to local level for rapid development.

Consequently, there was a nation-wide reorganization of local Councils, and in order to prepare for the incoming civilian rule, for the first time since the military administration, elections¹¹ were held to elect councilors into the local councils.

11. The elections were conducted on zero-party basis.

The councilors were allowed to elect among themselves, the Chairmen and supervisory councilors, who were all given executive powers, to run the Councils.

One thing noted during this time was the re-launching of the old politicians into the political arena. The Local Government served as the avenue for these politicians to resuscitate old alliances in preparation for the incoming civilian administration which was then proposed for 1979. Under such atmosphere no meaningful development could take place at the local level.

Local Government from 1979

With its coming into effect on the 1st of October 1979, the Constitution of Nigeria, (1979) by its section 7, empowered the State legislative Houses to create Councils by law and provide for their structure, composition, finance and functions. Such Local Government Councils were to be democratically elected. Although, the initial problem of who had the Constitutional power to create local government Councils was put to rest by the courts,¹² it was not possible to ensure the conduct of Local Government elections till the Second Republic collapsed. The Constitution could partially be blamed for this, since it vested power to conduct such elections in the State Electoral Commission and the Federal Electoral Commission at the same time, a situation which brought collision between the Federal and State governments particularly where different political parties were in control. Added to this was the inability of the Federal Electoral Commission to compile an acceptable voters' register.¹³

Though elections could not hold in the Local Government Councils, the State Governments exercised their power to create more Local Government Councils in outrageous numbers.

12. The Courts held that the legislature had the power - *Jideonwo & Ors. v. Governor Bendel State* (1981) INCLR 31; *Balogun & Ors. v. A. G. Lagos State* (1981) INCLR 1.

13. An attempt to hold local government elections in Lagos State was aborted following the Court Order in *Ajai v. A.G. Lagos State* (1981) INCLR 94 on the ground that the Voters' Register did not contain the name of the applicant.

Different Governors appointed their party supporters to manage the Councils. Such was the position until 1983 when the military toppled the second Republic, dissolved all Local Government Councils, reduced their numbers to the pre-second Republic situation and appointed Sole administrators to manage their affairs.

The unsatisfactory state of the Councils motivated the Federal Government to set up the Committee on the Review of the Local Government Administration in Nigeria. 1984. The committee's recommendations were later implemented by replacing the sole administrators with Chairmen and Supervisory Councillors.

The ill fated 1989 Constitution (it never did come into operation) which was to usher in the third Republic on the 1st of October 1992 gave Local Government prominence. Copious provisions were made for its establishment, functions, composition and structure. The quality of its political personnel was improved by prescribing possession of a minimum educational qualification of the School Certificate or its equivalent before they could stand for election. Executive powers were given to the Chairman, who could exercise such directly or through his Vice-Chairman or Supervisory Councillors or any of his officials. The chairman was elected by the electorate on his personal merit. To introduce the presidential system of government to the local level, the Chairman, though not elected by the Councillors, could be removed by them. The 1989 Constitution tried to solve the intractable problem of finance by providing that Federal statutory allocation to the Local Government councils should be given directly to them.

The wish of the Federal Military Government to disengage from administration motivated it to lift the ban on politics by 1988 and by December 1989, Local Government elections were held. As a transitional measure, provisions relating to local governments in the Constitution were promulgated into law, through the Local Government (Basic Constitutional and

Transitional Provision) Decree.¹⁴ This Decree was amended several times to curb political exuberance and intolerance at the local level.¹⁵

Following the military *coup d'état* of 1993 which brought General Abacha to government, the much expected third Republic was aborted. The Constitutional structures at all the levels of government were disorganized. Local Government Councils that had been performing creditably well were dissolved, thus bringing another period of uncertainty. Civil servants were drafted to be sole administrators of the councils with limited administrative and financial powers. This state of affairs continued until 1998, when in preparation for the fourth Republic which was to come into being in 1999, elections were held into the Local Government Councils.

A keen observer of Local Governments in Nigeria since independence will find it difficult to disagree with the following conclusions:

“In the first Republic, local government was regarded as an extension of the regional government, which had power to create and dissolve it as it wished, even on flimsy excuses.”

The military interregnum (1966 – 1979) saw a pitiable Local Government as an important tier of governance. There was no clear policy than that it just existed according to the whims and caprices of the military regime, even though an attempt was made to rejuvenate it in 1976.

14. No. 15, 1989.

15. See Local Government (Basic Constitutional and Transitional Provisions) (Amendment) Decree 25, 1990 (made in October 1990); Local Government (Basic Constitutional and Transitional Provisions) (Amendment No. 2) Decree No. 18, 1990 (made in December 1990); Local Government (Basic Constitutional and Transitional Provisions) (Amendment No. 3) Decree No. 23, 1991 (made in June 1991).

The Second Republic 1979 - 1983) saw a return to the first Republic phenomenon where the Local Government served as a whipping and weeping child. Arising from their Constitutional power, State governments created them not on the basis of need but just to satisfy their political calculations. The governments also cornered federal allocations meant for their Local Governments, with the effect that there was no fund at the local level. Unfortunately, areas where they could raise funds had been taken over by the State Government in retaliation of the federal government taking over their own by virtue of the grossly expanded exclusive list.

The only time the Local Government witnessed a ray of hope was between 1989 and 1993 when the 1989 Constitution recognized it as an important tier of government for development. The presidential system of government was introduced into it. Only the federal legislature could create it, while federal funds to it were allocated and disbursed directly to it and not through the State Government. Unfortunately, that golden age did not last.¹⁶

The Local Government has, therefore, from independence, been plagued with administrative, financial, political and structural crises. It was therefore not to be too much to hope that the 1999 Constitution would provide panacea for all these crises. Unfortunately instead of reducing in the crises, the problems are becoming cancerous in the political system. Today, they have become so endemic that the democratic dispensation is highly threatened. They will be addressed one after the other.

Creation of Local Governments

Recent experience shows that creation of Local Governments by civilian regimes cannot be free from controversy. It is always attended by political colouration. While it is felt that Local

16. M. Olu Adediran: "Federalism and Local Government Autonomy in Nigeria: An Appraisal" in Yakubu J.A. ed. *Socio-Legal Essays in Local Administration in Nigeria*, Demyaxcs Law Books 2003, Chapter 12.

Government Councils should be created in deserving situations, there is always suspicion and opposition when they are created in large numbers without regard to viability. The same controversy surrounded the post - 1979 creation of Local Government Councils. It will be recalled that Oyo State increased its Councils to 54 from 24, Kaduna State increased its own to 70 from 17 while Lagos State increased its number to 30 from 10. Today, Lagos, Nasarawa, Katsina, Niger and a few other States have created more Local Government Councils. There has been strong opposition from the Federal Government which claims that the creation is unconstitutional. The way the arguments rage on gives the impression that the Constitution failed to make provisions for the creation of local councils. There are adequate provisions for the creation of Local Government Councils in the 1999 Constitution. Like the 1979, but unlike the 1989 Constitution, power to create Local Government Councils is vested in the State. But this is not the whole story. While creation is the function of the State, authority for recognition for such creation is given to the National Assembly. It will be pertinent to quote the relevant provisions.

Section 7 (1) of the 1999 Constitution provides:

The system of local government by democratically elected local government Councils is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and function of such councils.

Section 8 (3) provides for the procedure for creating new local government councils. It provides:

A bill for a Law of a House of Assembly for the purpose of creating a new local government area shall only be passed if -

(a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following namely-

(i) the House of Assembly in respect of the area; and

(ii) the Local Government Councils in respect of the area is received by the House of Assembly;

(b) a proposal for the creation of the Local Government area is thereafter approved in a referendum by at least two-thirds majority of the people of the Local Government area where the demand for the proposed Local Government area originated;

(c) the result of the referendum is then approved by a simple majority of the members in each Local Government Council in a majority of all the local government Councils in the State; and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority members of the House of Assembly.

The role of the National Assembly is recognized under sections 8 (5) and 8 (6) which provide:

(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of States or Local Government areas as provided in section 3

of this Constitution and in Parts I and II of the First Schedule to this Constitution.

(6) For the purpose of enabling the National Assembly to exercise the powers conferred upon it by sub-section (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to sub-section 3 of this section, make adequate returns to each House of the National Assembly.

Section 3 of the Constitution names the thirty six States of the Federation while Parts I and II of the First Schedule make provisions for the local Government areas constituting each State and the boundaries of the Federal Capital Territory, respectively.

Considering all the provisions together, where a State has created Local Government Councils, following the laid down procedure, it must make returns to each House of the National Assembly to enable the latter make "consequential provisions" with respect to the names and headquarters of the newly created Councils. It is only when this has been done that one can legally conclude that new Local Government Councils have been created.

It is submitted that the National Assembly has the duty to make consequential provisions once returns have been made to it by the House of Assembly. It is also submitted that since new Local Government Councils will be created by law, it is the House of Assembly that will make returns to the National Assembly.

It does not appear that the National Assembly has made any consequential provisions in relation to the newly created Local Government Councils in Nigeria. If that is the case, the procedure for the creation of new Local Government Councils is yet to be completed.

Local Government Funding

This is another area threatening democracy. As at the time of writing this piece the Federal Government was withholding its statutory allocation to Local Government Councils¹⁷ in Lagos, Nasarawa, Yobe, Jigawa, Katsina and Niger States on the grounds that the new Local Government Councils are not recognized or that elections were held in some before the March 2004 Local government elections. The staff of the affected Local governments are restive. The pertinent questions are - who should fund Local Governments? Can the federal allocation to local government be legally withheld? I will answer these questions seriatim.

Like the Federal and the State Government, Local Government is a tier of government, funded from the national purse. This is simply because there is a national fund somewhere which is at the disposal of all tiers of government.

There is no doubt that Local Government Councils have not fared well in revenue generation. They have, over the years, relied on the two tiers of government for funding. This makes them subservient to these other tiers. For example, between 1990 and 1992, only Lagos State Local Governments were projected to generate as much as 19.88% of their total revenue; the other States were to generate less than 10%. In fact Local Governments in Sokoto State expected merely 0.87% of their total revenue to be generated internally. Conversely, the bulk of their annual revenue came from the Federal allocation. For example, within the same period, Sokoto State had 70.44% of its annual revenue coming from the Federal allocation. Akwa Ibom had 69.83% while only Lagos State had less than 50% as federal allocation. By implication therefore, once the Federal Government has any revenue problem, the Local governments will also be adversely affected.

If rule of law is to be followed, the Federal Government ought to have gotten a court declaration before withholding allocation.

The Constitution is very clear on the funding of Local governments from various sources, federation allocation being the major one, followed by State allocation. Section 7 (6) of the Constitution of the Federal Republic of Nigeria 1999 provides:

Subject to the provisions of this Constitution:

- (a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and
- (b) the House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

Section 162 (3) provides that:

Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local government Councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

By section 162 (4),

Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.

Section 162 (5) provides:

The amount standing to the credit of local government Councils in the Federation Account shall also be allocated to the States for the benefit of their local government Councils on such terms

and in such manner as may be prescribed by the National Assembly.

Section 162(6) provides:

Each State shall maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the local government Councils of the State from the Federation Account and from the Government of the State.

Section 162(7) provides:

Each State shall pay to local government Councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

By Section 162(8),

The amount standing to the credit of the local government Councils of a State shall be distributed among the Local Government Councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State.

It is clear from the foregoing provisions that the Federal and State Governments must fund the Local Government Councils¹⁸ through the Federal Allocation and State Allocation. Is it therefore Constitutional to withhold such allocation under any guise? My submission is capital NO. In as much as I have argued that newly Local Government Councils are not Constitutional until the National Assembly exercises its powers under section 8 (5), federal allocations cannot be withheld but must be disbursed in line with the recognized Local Government Councils. It should

18. The Local Government Councils have other sources of revenue, like internally generated revenue, grants, loans, etc.

therefore be left to those States that have created new Local governments Councils to disburse such funds "on such terms and in such manner" as they like, in accordance with section 162(8) of the Constitution. This is only logical reasoning as there will be chaos and anarchy otherwise. It has even been suggested in political circles, that federal allocation should be made directly to the Local government councils. This will be contrary to sections 162(6) and (8) of the Constitution and therefore unconstitutional.

Composition of the Local Government Councils

By our definition and the Constitutional provisions, Local government Councils must be democratically constituted. That means that the local citizens must have a say in the choice of those who are to lead them. Section 7 of the Constitution leaves no one in doubt that Local government Councils must be democratically constituted. Until the latest elections¹⁹ Local government Councils had not been constituted constitutionally.

The proceeding set of elected Councillors were elected on the 5th of December 1998 for three years²⁰. They did not assume office until the 29th of May 1999. By May 2002, their term expired. Instead of conducting Local government elections, the various State governments allowed political considerations to blindfold their Constitutional responsibilities. They appointed Caretaker Committees to run the Local government Councils. If the country was run by a single political party, one could argue that the deliberate subversion of the Constitution was politically motivated to assist the political party. In a multi-party dispensation, it appears all the political parties – namely the Peoples Democratic Party (PDP), the Alliance for Democracy (AD) and the All Nigerian Peoples Party (ANPP) that controlled all the States conspired to render the Constitution ineffective.

19. Local Government elections were held on 27 March 2004.

20. Elections were conducted under Local Government (Basic Constitutional Transitional Provisions) Decree No. 1998.

By law, the conduct of Local government elections is the duty of the State Independent Electoral Commission. In this regard, paragraph 4, Part II of the Third Schedule provides:

The Commission shall have power:

- (a) to organize, undertake and supervise all elections to local government councils within the State.

For all the States except few in the North Western area of the country, to have waited and conducted the local government elections the same day was unimaginable. The conduct of elections same day throughout the country gave the impression that the Federal electoral body should be responsible for those elections. This is not so. Democracy can only be stable when those elected have passed through a system that guarantees confidence, transparency and fairness. This means that the electoral system must be fair in all its ramifications.

The Political Bureau²¹ underscored this important aspect of democracy when it concluded as follows:

It is generally agreed that four basic conditions are necessary for the holding of free and fair elections.

- (a) an honest, competent, non-partisan administration to run elections;
- (b) a general acceptance throughout the political community of certain rather vague rules of the game, which limit the struggle for power because of some unspoken sentiment that if the rules are not observed more or less faithfully the game itself will disappear amid the wreckage of the whole system;

21. The Bureau was set up on January 13, 1986 by the erstwhile Federal Military Government to conduct a national debate on the political future of Nigeria. The report submitted formed the foundation of the 1989 Constitution of Nigeria which never became operative.

- (c) a developed system of political parties, traditions and teams of candidates before the electors as alternatives between to choose; and
- (d) an independent judiciary to interpret electoral laws.²²

It is the realization of the above basic conditions of democracy that has been the bane of Nigerian political progress and emancipation. Right from the beginning of the electoral system, Nigeria has been in search of one that will guarantee free and fair elections. The administration of the electoral system has been abysmally unacceptable.

The lopsidedness of the results in favour of the ruling parties in the 2004 Local government elections cannot be divorced from the fact that the political parties constituted the Electoral Commissions, provided the logistics and had influence on the security agencies that "maintained" law and order during the elections.²³

Democracy, through the electoral process is becoming a bitter pill to swallow in Nigeria. It is merely being tolerated as an alternative to military dictatorship. If democracy truly means government of the people by the people and not by a political class or elite, the earlier the electoral process is improved, the better for the country. This task is not only for the government but also for the electorate.

Electoral Administration

The importance of electoral administration cannot be over-emphasized. The success or otherwise of democracy partially depends on the quality (intellectual, moral or otherwise) of those

22. See the *Report of The Political Bureau*, Ministry of Information Lagos 1987 p. 137 paragraph 8.045.

23. See *Democracy Monitor* - Reports of March 27, 2004 Local Government Elections. Vol 6, April 2004 (Justice, Development and Peace Commission, Ijebu-ode).

appointed to oversee the electoral process. Blame has always been heaped on electoral commissions whenever any electoral process fails. It is generally known that electoral candidates anywhere in the world, will want to be at an advantage in the election process, to the extent that all available tricks will be employed to ensure their victory in elections. Such tricks will be futile if those to administer the electoral process are not corrupt, if they are independent and vigilant. History has it that most elections held in Nigeria since independence were far from being free and fair. Although the electorate could also be blamed, the Electoral Commissions have tended to come under the big hammer since it is believed that for one reason or the other they have neglected to exercise to the maximum, the Constitutional powers given to them.

In 1964, 1983 and recently in 2004, allegations of partiality, favouritism and partisanship by the electoral Commissions were rife. The view has been expressed that the Commissions should be insulated from all these influences to give the electoral system credibility. The structure and Constitutional arrangements for the Commissions has been viewed as allowing for the untidiness. There are arguments that a single Electoral Commission for the whole country would perform better. On the contrary, it is also another view that in consonance with the Federal system of government, there should be a parallel system of electoral commissions for the Federation and the States.

Constitutional Arrangements

While it may not be necessary to go into the pre-independence and the immediate post-independence arrangements, it will be highly informative to note that the Electoral Commission in the former period was efficient, non-partisan and fair, while performance of the latter Commissions has suggested that "he who pays the piper dictates the tune."²⁴ Under the 1979

24. The results of the 1959 and 1964 general elections clearly showed the fairness or otherwise of the presiding electoral Commissions. See particularly K.W.J. Post:

Constitution of Nigeria, two electoral Commissions existed. There was the Federal Electoral Commission (FEDECO) that was saddled with several responsibilities listed in the Third Schedule to the Constitution. These were:

- (a) to organize, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State and to the membership of the Senate, the House of Representatives and the House of Assembly of each of the States of the Federation;
- (b) to arrange for the registration of persons qualified to vote and for the maintenance and revision of the register of voters; and
- (c) to ensure that the register of voters is prepared and maintained in such form as to facilitate its use for the purpose of elections to local government Councils.

There was also the State Electoral Commission which was given power to:

- (b) Organize, undertake and supervise all elections to local government Councils within the State;
- (c) Tender such advice as it may consider necessary to the Federal Electoral Commission on the compilation of the register of voters in so far as that register is applicable to local government elections in the State.

The provisions of the Constitution look simple and easy to implement. Unfortunately, because of party politics and suspicion, no Local government election was held throughout the

Second Republic (1979-1983). While some States wanted to conduct elections, FEDECO whose duty it was to compile the voters register failed to do so, thus disenfranchising a large number of eligible voters. An attempt to conduct local government elections in Lagos was frustrated on the basis that the Voters Register did not contain the names of the applicant.²⁵

There was an attempt at remedying this unsatisfactory situation in the 1989 Constitution of Nigeria²⁶. That Constitution provided for a single electoral Commission called the National Electoral Commission, saddled with the duty of conducting elections to all offices including the Local government Councils.

Electoral Bodies under the 1999 Constitution

The 1999 Constitution creates two electoral bodies to oversee the conduct of elections. Under the Third Schedule, the Independent National Electoral Commission (INEC) is created with the following powers:

- (a) to organize, undertake and supervise all elections to the office of the President and Vice-President, the Governor and Deputy-Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation;
- (b) to register political parties in accordance with the provisions of this Constitution and an Act of the National Assembly;
- (d) monitor the organization and operation of the political parties, including their finances;

25. See *Ajai v. A.G. Lagos State* (1981) INCLR 94.

26. This Constitution was to be effective from October 1993 following a long transition programme, but could not because of the annulment of the 1993 presidential election results by President Ibrahim Babangida.

- (e) arrange for the annual examination and auditing of the funds and accounts of political parties and publish a report on such examination and audit for public information;
- (f) arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under this Constitution;
- (g) monitor political campaigns and provide rules and regulations which shall govern the political parties;
- (h) ensure that all Electoral Commissioners, Electoral and Returning Officers take and subscribe the oath of office prescribed by law;
- (i) delegate any of its powers to any Resident Electoral Commissioner; and
- (j) carry out such other functions as may be conferred upon it by an Act of the National Assembly.

Also established under the Constitution is the State Independent Electoral Commission, with the power:

- (a) to organize, undertake and supervise all elections to local government Councils within the State;
- (b) to render such advice as it may consider necessary to the Independent National Electoral Commission on the compilation of and the register of voters in so far as that register is applicable to local government elections in the State.

Considering the importance of Local government Councils as a vehicle for mobilizing the citizens politically, the Constitutional arrangement could be used to create problems, particularly in a multi-party system where the Federal government may be controlled by a party different from that in control of the State government. Since the INEC and the State Independent Electoral Commission are constituted by different political authorities,²⁷ each authority is not unlikely to take political considerations into account in making appointments to these bodies.

In recent times, particularly in the last 2004 Local government elections, this interest surfaced. While Local government elections were delayed in some States controlled by the Peoples Democratic Party (PDP) which is the party in control of the federal government, states controlled by All Nigerian Peoples Party (ANPP) had their elections. Of course, the elections favoured each ruling party. This shows that each electoral Commission favoured the ruling and appointing political party either openly or by conniving at some irregularities.

Secondly, the INEC could frustrate the States that wish to conduct Local Government elections on the ground that the voter's register is being revised. This happened when the 1979 Constitution was extant in the Second Republic.

There is no Constitution that is perfect in the world but what exists in several countries is the consensus of the people to make their Constitution work. No matter how unworkable a Constitution may seem, it will work if all the stakeholders operate it in good faith and with commitment and patriotism. To put one forward to serve should not be a matter of life and death. The example of Abraham Lincoln, one time President of the United States of America, readily comes to mind. He became the President after several losses at elections. The first solution to

27. The President appoints members of INEC while the Governors, by virtue of section 19, constitute the membership of the State Independent Electoral Commission.

our electoral retrogression is for the stakeholders, whether the electorate or the politicians to regard politics as a game that must be played according to the rules and that just as one cannot lose all the time, he cannot also win all the time.

Secondly, all people involved in the administration of electoral process right from the registration officers to polling officers, agents, security agents, returning officers etc. must maintain neutrality in the process. They should not thwart the wish of the electorate, by assisting any political party. The confidence of impartiality reposed in them should not be abused.

Thirdly, stiff penalties should await those who commit electoral offences. Penalties should be without a fine and this must be administered by an impartial and uninfluenced judiciary.

Fourthly, there should be a link between the Federal and State electoral Commissions. They should overlap somewhere so as to check each other. The proposal during the 1995 Constitutional Conference appear to have had the potential for solving the problem of Electoral Commissions wanting to please the appointing authorities to the detriment of other political parties. It had proposed that the State Electoral Commission should consist of the State Resident Electoral Commissioner, as Chairman and three other members, one from each of the Senatorial Districts. Under this arrangement, the State Resident Electoral Commissioner, would be a member of the National Electoral Commission appointed by the President while the other three members from the Senatorial districts would be appointed by the Governor of the State.

With the overlapping arrangement, in a situation where the President and the Governor belong to different political parties, it would be difficult for their "nominees" to foster their individual parties' interests without delaying the system. The nominees would be a check on each other, thus making the electoral process free from political manipulations.

Local Government Autonomy

Local government practitioners have complained bitterly of being burdened with many directives from the Federal and State governments which tend to affect their performance. Incidentally, this cannot be a surprise. The way the Constitution places the Local Government, makes autonomy impossible for that tier of government. The question may arise as to whether autonomy, even to a certain extent, is necessary for the Local Government. Section 7 (3) of the 1999 Constitution, empowers the Local Government, as a partner in development, to be involved in economic planning, within its area. The section provides:

It shall be the duty of a local government Council within the State to participate in economic planning and development of the area referred to in subsection (2) of this Section and to this end an economic planning board shall be established by a law enacted by the House of Assembly of the State.

To be able to carry out this important role, the Local Governments need breathing space and independence to initiate and implement developmental projects without constant disruptions in their composition, unnecessary limitations on their spending profile, incursion into their areas of financial base and limitations in their administrative powers²⁸. The Local government should be able to operate in an atmosphere that encourages initiative and exhibition of local talents for grassroot development. Unfortunately however, there are Constitutional and statutory encumbrances on the autonomy of Local governments.

28. See M. Olu Adediran, *Ibid.*

Constitutional Provisions

The establishment, structure, composition, finance and functions of Local government are determined by the State government.²⁹ Until recently, there was a running battle between the Local governments and their State legislatures on the tenure of the Local governments. In some States the Governors had removed Local government Chairmen while some were threatened.

- a. Local government boundaries are adjusted by the State Legislature.³⁰
- b. New Local governments are created by the State Legislature.³¹
- c. Federal allocation and disbursement to local governments are controlled by the Federal and State Governments.³²
- d. Customary courts which enforce bye-laws passed by local governments are established by the States.³³
- e. The National Population Commission which is a Federal executive body infringes on the powers of the local government in respect of registration of births and deaths.³⁴
- f. The Revenue Mobilisation Allocation and Fiscal Commission determines remuneration of political office

29. Paragraph 24 (b) 3rd Schedule, see also Nassarawa State directive to Local Governments that they should not register births, since it is the function of the National Population Commission – (*Nigerian Tribune* March 14, 2001 p. 5).

30. Paragraph 32 (d) Part I Schedule 3.

31. Paragraph 4 Part II Schedule 3.

32. Sections 64, 65 and 66 Local Government Law Cap 66, 1978 Laws of Oyo State, (now 2002 Laws).

33. Section 87.

34. Section 46.

holders throughout the Federation, including the local governments; not caring whether any local government is in a position to carry the financial burden.

- g. Elections into the local governments are conducted by the State Independent Electoral Commission, (a State body) without input from the local governments.

Other Statutory Provisions

The Local Government Law

Using the Oyo State Law as an example, one finds a lot of provisions empowering the Local Government to take certain steps or set up certain administrative bodies to assist it in the performance of their functions but with the prior approval of the State government otherwise such steps or bodies would be unlawful. Examples are:

- (i) Operation of a local government must be within the Law made by the State.³⁵
- (ii) Senior officers of local governments are provided by the Local Government Service Commission set up by the State.
- (iii) Any Joint Committee of Local Governments must be approved by the State.³⁶
Any subordinate Area Committee established must be approved by the State.
- (v) Police Committee is constituted by the State.³⁷
- (vi) Power to engage in trade, commerce and Industry is determined by the State.
- (vii) Collection of levies for social activities is determined by the State commissioner.
- (viii) The Governor may limit power on contract.³⁸

35. Section 45.

36. Section 50.

37. Section 61.

38. Section 157.

- (ix) Pensions of Local Government officials are determined by the State.
- (x) The State can institute inquiries into Local Governments.
- (xi) Appointment of Local government inspectors is by the state.
- (xii) Power to suspend and appoint Committee of Management is vested in the State.³⁹
- (xiii) Power to order local government to perform functions is vested in the State Grants from a local government to another must be approved by the State.⁴⁰
- (xiv) Financial memoranda of the State must be followed.
- (xv) Approval of annual Estimate for the local government is vested in the State.⁴¹
- (xvi) Directives as to rating are given by the State.⁴²
- (xvii) Constitution of Assessment Appeal Tribunal is done by the State.⁴³
- (xviii) Auditing of Accounts is carried out by the State.
- (xix) Appointment of auditor is done by the State.
- (xx) Rendering of Account to the State Executive Council by the local government must be done yearly.⁴⁴
- (xxi) Approval of Bye-Laws is by the State commissioner
- (xxii) Directives as to Adoptive bye-laws are given by the commissioner.⁴⁵
- (xxiii) Reports of Joint Boards shall be made to the commissioner.

39. Section 158.

40. Section 166.

41. Section 167.

42. Section 169.

43. Section 182.

44. Section 187.

45. Oyediran O.: "Functions of Local Government" in Oladimeji Aborisade (eds).
Ibid p. 41.

(xiv) Order as to acquisition of land may be given by the commissioner.

Although these are important matters which need adequate supervision by another body, one cannot but ponder what it would look like if same functions by the States were to be supervised by the federal government. The fact that there exists Commissioners for Local Governments at state level or that the Deputy-Governor is in charge of Local governments puts no one in doubt that under the present dispensation, Local governments have no autonomy. No wonder, there are crises in some states between local governments and the State governments.

Functions/Legislative Competence of Local Government Councils

The 1999 Constitution is couched clearly to show the legislative competence of the Federal and State governments as personified in the National and State legislative Houses. Section 4(2) & (4) empower the National Assembly to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List and to a limited extent, the Concurrent Legislative List.

The House of Assembly of a state, on the other hand, has power to make laws for the peace, order and good government of the State or any part thereof on any matter not included in the Exclusive Legislative List, and on Concurrent Legislative List to a limited extent. The Constitution may empower both legislative Houses to legislate on any other matter.

The specific lists mentioned contain various executive matters on which laws can be made. These matters are like functions of the Federal and State Governments. Though there is no corresponding provision for Local government councils, it can be argued that they too have power to make laws for the peace, order and good government of their local areas or any part thereof in respect of those matters listed in the fourth Schedule to

the Constitution. Not only this, by virtue of section 7(1) of the Constitution, they will still have power to make laws on matters in respect of which they are empowered by the State Law. On the question of the functions that local government councils should perform, Oyediran has argued that they should be those:

- (a) Which require detailed local knowledge for efficient performance;
- (b) In which success depends on community responsiveness and participation; and
- (c) Which are of a personal nature requiring provision close to where the individuals affected live; and in which significant use of discretion or understanding of individuals is needed.”⁴⁶

One would add that the Local government council should have the capability to fund and maintain such functions. The functions of Local government can be said to be derived from two sources:

The Constitution

Taking after the 1979 Constitution of Nigeria, the 1999 Constitution has in its fourth Schedule provided for the functions of Local Government councils thus:

“The main functions of a local government council are as follows:

- (a) The consideration and the making of recommendation to a State Commission on economic planning or any similar body on:
 - (i) the economic development of the state, particularly in so far as the areas of authority of the council and of the state are affected; and
 - (ii) proposals made by the said commission or body;

46. See item 30 in the concurrent legislative list.

- (b) collection of rates, radio and television licences;
- (c) establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm;
- (d) licensing of bicycles, trucks (other than mechanically propelled trucks) canoes, wheel barrows and carts;
- (e) establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences;⁴⁷
- (f) construction and maintenance of roads, streets, street lighting, drains and other public highways, parks, gardens, open spaces, or such public facilities as may be prescribed from time to time by the House of Assembly of a State;
- (g) naming of roads and streets and numbering of houses;
- (h) provision and maintenance of public conveniences, sewage and refuse disposal;
- (i) registration of all births, deaths and marriages;
- (j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State, and
- (k) control and regulation of:
 - (i) out-door advertising and hoarding;
 - (ii) movement and keeping of pets of all description,
 - (iii) shops and kiosks,
 - (iv) restaurants, bakeries and other places for sale of food to the public,
 - (v) laundries, and
 - (vi) licensing, regulation and control of the sale of liquor.

47. See item 18 on the concurrent legislative list.

These are the main functions of Local government councils but they are not exhaustive as to preclude participation in other functions. Hence paragraph 2 of the Schedule provides:

“The functions of a local government Council shall include participation of such Councils in the Government of a State as respects the following matters:

- (a) the provision and maintenance of primary, adult and vocational education the development of agriculture and natural resources, other than the exploitation of minerals;⁴⁸
- (b) The provision and maintenance of health services; and
- (c) Such other functions as may be conferred on a local government council by the House of Assembly of the State.

It is assumed; by our opinion expressed above, that paragraph I of the fourth Schedule is the exclusive legislative list of local government councils, while paragraph 2 is the concurrent list on which they can “legislate” concurrently with the state. However, in view of the fact that the matters contained in paragraph 2 are within the states’ powers under the legislative lists, it is assumed that the participation of the Local Government council will be determined by the State Law.

The Statute

Both section 7 (1) and paragraph 2 (d) of the Fourth Schedule to the 1999 Constitution empower the House of Assembly to confer on or provide functions for the Local Government Councils

48. Cap 66 Laws of Oyo State 1978 now re-enacted in 2001 Laws of Oyo State.

within the state. Therefore, apart from the "legislative list" for Local government councils, provided by the Constitution, a State statute may also do the same.

It is in the light of this that recourse can be made to the Local government law of the State to identify functions (or call it a legislative list) of the Local government Councils.

There is no marked difference in the various Local Government Laws of all the States in Nigeria. For easy accessibility, the Oyo State Local Government Law⁴⁹ is used as a model in this discussion. Section 58 provides for power generally, thus:

"(1) A Local Government shall have such powers and duties as are conferred or imposed upon it or under it by or under this Law or any other enactment

(2) It shall be the duty of every Local Government established under this Law

(a) to discharge the duties and obligations imposed by or under this law or any other enactment; and

(b) generally to assist in maintaining order and good government within the area of its authority, and for these purposes, a Local Government may, within the limits of the functions so conferred, either by its own employees or by duly appointed agents, do all such things as are necessary or desirable for the discharge of such functions."

That statute goes further to confer power on Local government Councils on prevention of crime;⁵⁰ trade; works and services; control of social functions;⁵¹ contract; acceptance of

49. Section 59.

50. Section 61.

51. Sections 62 and 63.

gift:⁵² provision of building offices:⁵³ charging of fees:⁵⁴ insurance⁵⁵ and modification of customary laws.

The statute also provides for exclusive and participatory functions for Local government Councils.

On the exclusive list, section 64 provides:

“Subject to the provisions of this Law or any other enactment, a Local Government shall have responsibility for, and power to make bye-laws for all the following matters, that is:

- (a) markets and motor vehicle parks;
- (b) sanitary inspection, sewage, refuse and night soil disposal;
- (c) control vermin;
- (d) slaughter houses, slaughter slabs;
- (e) public conveniences;
- (f) cemeteries and burial grounds;
- (g) registration of births, deaths and marriages, (other than marriages under the Marriage Act);⁵⁶
- (h) provision of community and recreation centres;
- (i) parks, gardens and open spaces;⁵⁷
- (j) grazing grounds;
- (k) fuel plantations;⁵⁸
- (l) licensing, supervision and regulation of bake houses, eating houses and laundries;
- (m) licensing and regulation of bicycles, hand carts and other types of vehicles (other than vehicles which are mechanically propelled) and canoes;⁵⁹

52. Section 65.

53. Section 68.

54. Section 69.

55. Section 70.

56. Section 71.

57. Section 72.

58. Section 73.

59. It appears the Fourth Schedule to the constitution that does not limit the form of marriage will override the limitation under section 64 (g).

- (n) control or keeping of animals;
- (o) control of hoarding, advertisements, use of loud-speaker, in or near public places and drumming;
- (p) control of land held under customary tenure;
- (q) naming of roads and streets and numbering of plots and buildings;
- (r) control and collection of revenue from private forest estates;
- (s) collection of vehicle parking charges;
- (t) collection of community tax, property and other rates and other designated revenue."

On participatory or other list, section 66 provides:

"(1) Subject to the provision of this Law or any other enactment, the Instrument may confer power on a Local Government to be responsible for and to make bye-laws for all or any of the following matters, that is:

- (a) health centres, maternity centres, dispensaries and health clinics, ambulance services, leprosy clinics and preventive health services;
- (b) meat inspection and abattoirs;
- (c) nursery, primary and adult education;
- (d) information and public enlightenment;
- (e) provision of scholarships and bursaries;
- (f) provision of public libraries and reading rooms;
- (g) (agricultural and animal health extension services and veterinary clinics;
- (h) rural and semi-urban water supply;
- (i) fire services;
- (j) provision of roads (other than truck roads), their lighting and drainage;
- (k) support for arts and culture;
- (l) control of pollution;

- (m) control of beggars and prostitution and repatriation of destitutes;
- (n) provision of homes for destitutes, the infirm and orphans;
- (o) provision of public utilities including road and water transport;
- (p) public housing programmes;
- (q) regulation and control of buildings;
- (r) town and country planning;
- (s) operation of commercial undertakings;
- (t) control of traffic and parking;
- (u) piped sewage systems.

Where it is so provided by any enactment other than this Law, the Instrument may confer powers or impose duties on a Local Government pursuant to that enactment.”

Exercise of Legislative Power

As argued above, paragraph I of the Fourth Schedule to the Constitution and section 64, highlighted above, provide for the exclusive legislative list of the Local government Councils while paragraph 2 of the Fourth Schedule to the Constitution and section 66 and other sections referred to in the Local Government Law, consist of items on which the State can allow the Local Government Councils to legislate upon. In other words, the State can also legislate on them. In case of inconsistency of enactments, the Local government enactment will be void to the extent of its inconsistency.

Current experience has shown the infiltration of local government functions by state Governments. As a result of the expansion of the Federal Government's exclusive list from 45 items in the first Republic to 68 and reduction of Concurrent List from 29 to 12 items in 1999 Constitution, the States have taken over the functions of Local governments. Important areas where money could be made have been appropriated. This has limited

the legislative powers of Local Governments considerably a *fortiori* their fund generation portfolio.

These encumbrances, amongst others, were summarized by the Political Bureau thus:

“Despite the strategic importance of Local Government to the national development process, its contribution has been minimal. Some of those who contributed to the debate on Local Government attempted to provide reasons for the ineffectiveness of Local Government in the development process. Some agree that the ineffectiveness of Local Government derives primarily from excessive government control and interference in the performance of Local Government. Others claim that States have undermined the financial viability of Local Government by diverting statutorily allocated grants for Local Governments as well as encroaching on their revenue-yielding functions like, markets, motor parks, tenement rating, liquor licensing, etc.”⁶⁰

It is pertinent to conclude at this juncture, that the local government is a veritable tier that can transform the rural environment and bring about the intended dividends of democracy. This can only be realised if all the aforementioned issues are scrupulously addressed and lasting solutions provided for them.

60. See *Report of the Political Bureau*, *ibid* p. 120.

Part II

THE POLITICAL ARMS
OF
GOVERNMENT



FORESTALLING DIVIDED GOVERNMENT: NIGERIA AS A CASE STUDY

by

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Introduction

The very first challenge of our topic is the operational definition of the term divided government for it is not manifestly clear what it is supposed to mean by merely looking at the topic. The second challenge is the assumption contained in the title of this chapter that whatever it means, divided government is bad, wrong, inimical to a country and people and is therefore to be avoided at all cost. The third challenge is the belief that divided government can indeed be forestalled and if so how do we achieve this much desired goal for Nigeria taking into consideration the experience of the country since independence in October 1, 1960.

Our assignment can be approached from a number of angles all of which may be fruitful in providing food for thought. I choose to begin with a series of questions to which I may not necessarily have adequate or acceptable answers. I take solace in the Chinese saying that asks us to seek not to know all of the answers but to understand the questions. The assumption is that it is only someone who refuses to be wise that will insist on the hundred percent correctness of all his/her answers all of the time.

Some Questions

What then is a divided government? Is it as perceived by the citizen at the grassroots level, the state level or the federal level in a country where there are three tiers of government? Is a

* For an interesting discussion of a similar theme in respect of the United States, see James L. Sundquist: *Constitutional Reform and Effective Government* The Brookings Institution 1986 Chapter 4.

government divided only when the executive chairman of a local government council strongly disagrees with the elected supervisory councillors on issues relating to policies, projects and programmes intended for the benefit of the populace? Is there a divided government when the major disagreement is over the booty and spoils of office in an environment leading to antagonistic contradictions resulting in assassinations, conspiracies and removal? If this is also perceived as divided government how can it be prevented in the Nigerian context where governance is seen as providing opportunity to massively loot the treasury? Is it indeed desirable to prevent divided government in the forgoing situation when harmony will lead to the quiet and happy collective looting of the public purse by kleptomaniacs? When is there divided government at the state level? Is it similar to the aforementioned situation at the local government level? Do we assert the existence of a divided government whenever a state Governor suspects or is led to believe that the deputy governor is nursing an ambition to replace him in the event of the impeachment of the governor and therefore deserves to be ostracized and isolated? Is there a divided government when the head or chairman of a political party disagrees with the Governor of a state or Premier of a region and consequently attempts to undermine the authority or government of the governor or premier? Do the people see a divided government in practice when contradictory policies are imposed on them by the state government and the local government controlled by two different political parties or even the same political party? Is there a divided government at the state level when the legislature is controlled overwhelmingly by one political party different from that of the governor as is the situation in Peter Obi's Anambra State and was in Balarabe Musa's Kaduna State (1979 - 1983) the Second Republic and Otedola's Lagos State? When is there a divided government at the centre? Is it when the President and Vice - President are at logger heads over competing ambitions and intentions? Or is it

when the legislature contains a majority of members opposed to the policies of the President whether or not the same political party controls both arms of government? Can it be called a divided government where the constitutional provisions make it possible as in Fifth French Republic, for the Prime Minister and Cabinet to come from a political party different from that of the Executive President of the Republic usually called cohabitation? When following mid term elections in the United States of America, an opposing political party gains control of one or both Chambers of Congress thus embarrassing the ruling president, is there a divided government? If there is, is it desirable or must it be prevented at all cost? Is its existence in this form inimical to the interests of the ordinary American? There are a thousand other questions we can raise and keep raising but I think at this point we should begin to situate our discussion in Nigeria and our experience since 1960 which surprisingly is rich and diverse.

Historical Antecedents

The December 12, 1959 federal elections in Nigeria produced a coalition¹ government at the centre which ushered Nigeria into formal independence on October 1, 1960. The largest political party in the House of Representatives – the Northern People's Congress (NPC) teamed up with the National Convention of Nigeria Citizens (NCNC) to form a coalition government. The terms of the agreement included *inter alia*, the sharing of portfolios between the two political parties. The official opposition party- the Action Group (AG) chose to play the role of opposition rather than, team up to form a national government. The configuration of power at the national level also witnessed a situation in which the coalition partners controlled the governments of the Northern Region (NPC)² and the Eastern

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1. The last elections conducted by Britain as a colonial power. Dr. Azikiwe became the President of the Senate, then Governor-General on October 1, 1960 and President on October 1, 1963.
 2. Sir Ahmadu Bello was Premier of the Northern Region and leader of the NPC which produced Prime Minister Tafawa Balewa at the centre.

Region (NCNC)³. The main opposition party, the - Action Group- controlled the government of the Western region where the Premier, Chief S. L. Akintola was at the same time the deputy leader of the Action Group next to Chief Obafemi Awolowo, who had moved to the centre to become the official Leader of the opposition in the House of Representatives. Nigeria's experience of a divided government commenced at this point at two levels. The more dramatic division with far reaching political consequences took place in the Western Region when in 1962, the government of Chief S. L. Akintola was split into two as a result of the disagreement between the party leader Chief Awolowo and his deputy Chief Akintola who was however head of government in the region. Some ministers and legislators in the regional House of Assembly supported the Action Group leader as against the regional Premier and head of government. This led to a violent commotion in the regional house of assembly when an attempt was made to remove the Premier by a vote of no confidence. The two ruling coalition partners at the federal level, i.e. the NPC and NCNC, seized the opportunity to fish in the troubled waters of the opposition Action Group by helping to destroy its government in the western region through the declaration of a state of emergency and suspension of the regional government.

The consequences of that action for the political system were incalculable as it set in motion a concatenation of events which led to the treasonable felony trial involving Chief Obafemi Awolowo and some of his lieutenants, the displacement of the ruling Action Group party in the Western region after the six month period of emergency rule, the increasing hostility of the populace towards the new ruling Nigerian National Democratic Party (NNDP)⁴ led by the Premier, Chief Akintola and

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3. Dr. Michael Opara was the Premier of the Eastern Region and remained in power until January 15, 1966.
 4. The NNDP was a merger of the United Peoples Party and the rump of the NCNC in the Western region which had separated from the main party.

subsequent events including the 1965 regional elections which led to uncontrolled polymorphous violence that we shall return to later.

The coalition of the NPC and NCNC at the centre had followed its victory in destroying the government of the opposition Action Group in the West with a successful carving out of the Mid-west region before the inherent centrifugal forces in the coalition began to destabilise the federal government. In a parliamentary system of government which we had in the post independence period up to January 1966, patterns of conflict reflecting division in government were different. The most notable and well publicized referred to areas of jurisdiction of government ministries. The contest between the Minister of Foreign Affairs, Jaja Wachukwu and the flamboyant federal Minister of Information⁵ over who had responsibility for external publicity or propaganda was one that the Prime Minister did not succeed in decisively resolving. Fortunately, it was not a debilitating conflict and the lack of resolution was not the result of a weakness in the person of the Prime Minister. The dispute was to continue for decades with changing decisions made in favour of one ministry and then the other by the same head of state in some cases. On some occasions some twists and turns were introduced as when Chief Anthony Enahoro as Federal Commissioner for Information negotiated a very sensitive agreement with the Soviet Union and Czechoslovakia in the early months of our civil war instead of Dr. Okoi Arikpo who was then in charge of Foreign Affairs in Yakubu Gowon's government. Institutional rivalry and jurisdictional competition may not necessarily constitute divided government as the outcome of such contention may not be contradictory policies or projects. The phasing out of the U.S.I.S - United State Information Service and its functions being taken over by the State Department, was not seen as an attempt to deal with the

5. Chief T. O. S. Benson was the Federal Minister of Information.

consequences of a divided government. The American Congress had a different purpose in mind.

In the Nigerian setting, the rivalry and jurisdictional conflict between the Ministry of External Affairs and the Political Department of the Cabinet Office over foreign policy decisions during the Murtala/Obasanjo military government was well known with the most publicized incident being the decision to accord formal recognition to the government of Angola under the control of the MPLA - Popular Movement for the Liberation of Angola - in 1975. This was at a time when the official Organization of African Unity policy accepted by the ministry of Foreign Affairs of Nigeria, was to recognize only a government of national unity. Another incident in this direction was the cancellation of the invitation extended to the then United State Secretary of State, Henry Kissinger, to visit Nigeria. Both the Ministry of Foreign Affairs and the Nigerian Institute of International affairs had looked forward to such a visit. The Head of State accepted a contrary persuasive argument and cancelled the visit which was planned to take place before the 1976 Presidential elections in the United States.⁶

At this stage, we must return to the first civilian administration to conclude our examination of the phenomenon of divided government. With the common political enemy - the Action Group-neutralized and incapacitated, the strong bond holding the coalition government formed by the NCNC and the NPC began to weaken becoming unable to withstand the stresses involved in managing a federal system. A major disagreement involved the very important question of a national population census. The initial exercise showed a population count completely unacceptable to the North and this was cancelled with the Prime Minister's Office assuming responsibility for a new exercise as the first one was conducted by the Ministry of Economic Development with Waziri Ibrahim as the Minister.

6. The cancellation was effected at the instance of the Chief of Army Staff who was persuaded of the need to put off the high profile visit.

The second exercise of 1963 produced a population count highly controversial but acceptable to the North. The Eastern Regional Government rejected the figures with sympathy expressed by the Mid-West government. The National Economic Council which included all the regional premiers and the Prime Minister, by a majority of 3 - 2 accepted the correctness of the 1963 census exercise which had political implications for the country.⁷ This was the commencement of the big split among the federal government coalition partners. From that point on, efforts were made by the Akintola government of the Western Region to effect a political realignment in the country having successfully incorporated the NCNC in the West into the ruling NNDP. As new federal elections were due in December 1964, the schism within the federal ruling coalition became aggravated with the major decisions being affected by the greater consideration given to regional interest. A parting of ways soon emerged as the NCNC chose to form a new alliance with the rump of the Action Group which objectively was still strong notwithstanding the incarceration of the party leader Chief Obafemi Awolowo for treasonable felony and conspiracy.

The December 1964 federal elections were contested by the United Progressives Grand Alliance - UPGA and the Nigeria National Alliance - NNA with the latter bringing together the NNDP and the NPC. The preparations for the elections gave clear indications that massive rigging was contemplated. At the last moment, the UPGA decided to boycott the December 1964 federal elections. The boycott was however only 100 percent effective in the Eastern Region where voting materials were under lock and key and election officials stayed home. The initial refusal of the ceremonial head of state President Nnamdi Azikiwe to call on Prime Minister Tafawa Balewa to form a government following the controversial elections, created a constitutional

7. The population census moved from being a subject of pure statistics and numbers to pure politics and political considerations. We have not been able to have a hitch free population census since then.

crisis which was only resolved after it became clear that the Prime Minister as head of government and not the President as ceremonial Commander-in-Chief, had the loyalty of the armed forces. Fresh elections were conducted in the East and a national government of some eight four ministers (junior and senior) formed with Balewa at the head. While it was called a national government, unity could not be said to characterize the activities of the various political parties which provided ministers. The old rump of the Action Group was not represented as elections had been only partially boycotted in the west and Lagos and no fresh elections were held.

The country had gone through high level political crisis as a result of divided government but the end of the phenomenon was not in sight. The unrest and polymorphous violence in Tivland which the Nigerian Army was drafted in to quell, simply demonstrated the fact that instability was not limited to only one part of the country. Increasingly however, preparations for the 1965 Western Regional elections suffered set backs as it became clearer by the day that the ruling NNDP which had the support of the NPC and the federal government had lost popular legitimacy to the extent that the leaders took solace in the philosophical assertion that "one with God is a majority". The opposition party, the Action Group was however not prepared to accept such statements which were simply seen as an unholy cover to rig the elections in favour of the ruling party. This was exactly what happened and it marked the beginning of the end for the first civilian administration.⁸

What started off as a divided government in the Western Region and then moved to the federal government, had now created a situation of uncontrolled violence from a people who felt that the only legitimate method they had of changing a government and leadership they detested had been blocked for

8. The Action Group was unable to checkmate the ruling NNDP which was prepared to invent new modalities of rigging elections not previously known to the Action Group.

them by the massive rigging of elections which the NNDP government carried out with the assistance of the Police. The outcome was, eventually, the military overthrow on January 15 1966 of the civilian government in Nigeria.

Could divided government have been forestalled during the first civilian administration? Definitely part of what we saw could have been prevented had the protagonists foreseen the eventual consequences of their actions. No one knows whether or not our political history in the first republic would have been markedly different if the Action Group party leader had accepted the apology offered by the deputy and premier of the Western region who reportedly prostrated in the traditional way. It is only with the advantage of hindsight that anyone can make such a supposition. What cannot be in doubt however, is that the consequences of divided government at that time led to a concatenation of events in our political history including coups and counter coups, massacres a bloody civil war and prolonged military rule which took us to October 1, 1979.

The new era saw the introduction of a presidential system of government which, while different from the parliamentary system, was operated initially as if it was the same. The erroneous belief that a meaningful majority was needed in the National Assembly by the elected executive President, led to a coalition of the National Party of Nigeria (NPN) and the Nigerian People's Party (NPP) with the accompanying sharing of offices and other spoils of office.⁹ The coalition only lasted for a while before it collapsed but only after the larger party (the NPN) had realized that it did not need the formal alliance with the NPP to get things done in the National Assembly. While the passage of the first budget presented by the President to the National Assembly was not very smooth, subsequent budgets had easy passage as the documents presented had taken care of the

9. The NPN provided the Senate President Joseph Wayas while the NPP provided Ume Ezeoke as the Speaker of the House of Representatives as part of a larger arrangement.

interests of the legislators which apparently the first budget did not pay adequate attention to. Since the executive and the legislature were two distinct arms of government unlike in the first civilian dispensation, the possibility of a divided government was much higher in theory than in the first republic. There were 19 state governments and one federal government at the centre which in theory meant greater possibility of divided government than in the first republic. That indeed was what happened.

The twenty governments in the country were controlled by the five political parties which contested the 1979 elections. The Constitution of the Federal Republic of Nigeria 1979 made provision for the division of responsibilities and powers between the levels of government as well as for separation of powers at each level between the legislature, the executive and the judiciary. The new civilian administration in the country had to deal with the issue of jurisdiction, in particular, the powers of the federal government especially in those states where the NPN was not in control of the executive and the legislature. The fact that the leaders of major political parties in the first republic were still around and at the head of the NPP and the Unity party of Nigeria - (UPN) made it possible for the states controlled by their parties to contest the constitutional right of the president to take certain actions they did not consider appropriate. The appointment of Presidential Liaison Officers and the establishment of their offices in states not controlled by the NPN led to disputes between the centre and some of the states. This disagreement resulted in lack of cooperation but could not be said to be a sign of divided government inimical to the polity.

Kaduna state depicted the clearest case of divided government when the House of Assembly in which the NPN had two thirds majority, developed deep antagonism towards the governor who had been elected on the platform of the People's Redemption Party - (PRP). Governor Balarabe Musa was unrepentant in his principled stand which was strongly advocated by the Secretary to the State Government, Dr. Yusuf Bala

Usman. The NPN majority in the assembly impeached and removed the governor and had his deputy, Abba Musa Rimi sworn in as his replacement.¹⁰ With that experience behind him, Governor Musa Rimi handled the legislature with dexterity until the 1983 elections when the NPN succeeded in rigging the PRP out of power in Kaduna State. The other state controlled by the People's Redemption Party, Kano had its own version of divided government resulting from the dispute between the PRP Leader's decision to have a working arrangement with the NPN. Malam Aminu Kano was opposed to the proposed alliance between the progressives which saw a coming together of the UPN, PRP and Great Nigeria Peoples Party (GNPP) governors to present a formidable opposition to the NPN. This led to a split in the government of Kano state with Governor Abubakar Rimi determined to disobey the party leader while his deputy governor Dawakin Tofa (now late) accepted the position of the party leader Aminu Kano. A divided government then remained in power until Abubakar Rimi resigned as governor in order to contest the 1983 elections on the platform of another political party.

The phenomenon of divided government was also witnessed in the GNPP with party leader Waziri Ibrahim unable to control the governors of Borno state, Mohammed Goni and Gongola State, Abubakar Barde, who had won the 1979 governorship elections in the two large states. The leadership style of Alhaji Waziri Ibrahim in the GNPP was however quite different from that of Aminu Kano in the PRP. Consequently, there was relatively less acrimony resulting from the disagreement. The Unity Party of Nigeria which controlled the executive and legislature in each of the five western states of Oyo, Ogun, Lagos, Ondo and Bendel, was much more disciplined under the leadership of Chief Obafemi Awolowo. The incidence of divided government was essentially absent until 1983 when the issue of

10. The first impeachment had to comply with the two thirds majority requirement of the Constitution by bringing on a stretcher, a legislator who was seriously sick in hospital, to cast his vote on the floor of the House of Assembly.

second term elections came up for the governors and not all deputies were prepared to accept the ruling of the party leader unconditionally. The real headache for the party came in Ondo State where the Deputy Governor - Akin Omoboriowo, denounced the party and crossed over to contest election on the platform of the NPN. The "allocation" of the governorship position to him by the electoral commission was overturned by the Supreme Court when it became clear that the people of Ondo State would not pusillanimously sit by and allow the travesty to go unpunished a la 1965.¹¹

In general there were healthy developments on the governance front with willing resort to the Courts in disputes involving the federal government and the state governments.¹² The role of the Nigeria Police was contentious then although less so than it is now. Jurisdictional disputes as to which level of government had responsibility for matters such as housing for the masses were handled differently from state to state. The right of the federal government to build such houses in the states was for example rejected in Anambra state where the government of Jim Nwobodo, refused to allocate land for such development. Some UPN governors allocated land in remote areas to reduce the positive political gains which the NPN federal government wished to derive from such housing projects. The death knell of the second republic was the massive rigging of the elections in 1983 in the midst of a rapidly deteriorating economy and, by the standard of that time, massive corruption and political rascality and arrogance.

On the last day of the year, the military returned to power following daily prayers and night vigils held in many parts of the country asking for a change of government. For the next fifteen

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11. In similar circumstances, the rigging against Governor Jim Nwobodo of Anambra State was not overturned by the Court.
 12. The Governor of Bendel State, Professor Ambrose Alli, took the federal government to Court on the revenue allocation act and won the case at the Supreme Court. President Shagari's government obeyed the decision of the apex court.

years and eight months, the military was in control of the federal government except for the 82 days of Chief Ernest Shonekan's Interim National Government which took over the running of government between August 26 and November 17, 1993. The phenomenon of divided government did not disappear. It only changed in character manifesting itself in successful and unsuccessful military coups some of which were palace efforts. Most failures were met with decisive neutralization of the officers concerned similar to the fate which befell Major General Bissala and others in the 1976 failed efforts to overthrow the Murtala Mohammed government.¹³ The nature of the military would not accept disloyalty and iota of doubt were visited with dismissal or termination to prevent the possible overthrow of government. Yet during this period, there were robust disagreements in the polity, between ministers at the federal level which required resolution by the Commander-in-Chief of the Armed Forces and Head of State.¹⁴ Evidence given to the Oputa Panel¹⁴ of enquiry indicated beyond doubt what the nature of the intrigues and conflicts was during the military era. It is, notwithstanding still too early to have full disclosure of the extent of division within the government and what needed to be done to prevent exacerbation of the situation.

We see a flow into the current civilian dispensation whose foundation was laid by General Abdulsalam Abubakar when he relatively liberalized the polity by announcing an irrevocable decision to return the military to the barracks by handing over power to an elected civilian administration. The time table he set

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13. Major General Bissala was the Defence Minister in the Murtala Mohammed government who was executed with others following the assassination of the Head of State in a failed military coup in 1976.
 14. Chief of General Staff Vice Admiral Ebitu Ukiwe and second in command to President Ibrahim Badamosi Babangida, left the administration in 1986 reportedly over disagreement on policy matters.
 14. The Human Rights Violations Investigation Panel led by Justice Chukwudifu Oputa set up under the current civilian government of Chief Olusegun Obasanjo to establish the nature and extent of human rights violations and recommending measures to redress the injustice and forestall future violations of human rights.

for the departure of the military did not give room for the convening of any sovereign national conference that might have become intractable. The Constitution of the Federal Republic of Nigeria 1999 was promulgated on May 5, 1999 by decree 24 of the year and largely related the 1999 Constitution with amendments. Whereas in 1979 there were 19 state governments, by 1999 they were 36 state governments, one administration in the Federal Capital Territory and one Federal Government. Account must also be taken of the 774 Local Government Areas and their elected chairmen and councillors. The potential for divided government was *ipso facto* great.

The legal frame work for the relationship between the levels of government recognized by the Constitution itself is contained within the 1999 document. For instance, the Fourth schedule to the Constitution lists the functions of a local government council yet section 7 of the Constitution which guarantees the system of local government democratically elected by the people, also empowers the state House of Assembly to determine by law *inter-alia*, what the functions of local government councils in that state should be. These constitutional provisions have provided occasions of conflict between state governors who wish to have access to more areas for revenue generation such as collection of tenement rates from landlords and local government chairmen who understand the constitutional provisions in this direction. This is irrespective of whether the same political party controls the state government and the local government concerned. The operation of the constitutionally provided State/Local Government Joint Account has also generated conflict and led on many occasions to the removal or suspension of "recalcitrant" local government chairmen and their replacement with pliable individuals. It has not however been one sided all along as some local government chairmen have succeeded in providing documentation to the Economic and Financial Crimes

Commission implicating state governors and putting the fear of God into some of them.¹⁵

Government ought to be about service to the people and any dispute or conflict should be on which policy serves the people better and if possible, at a cheaper price. Independent agencies of state governments which clash with functionaries of local government are not often perceived to be doing so in the interest of the people. Competitive extortion efforts between these agencies and functionaries make the people the direct victims of divisions in government. This is worsened when a federal agency is also involved in a tripartite conflict for jurisdiction which happened in Lagos on so called federal roads. Multiple taxation systems have proved relatively easier to handle when compared with the experiences of motorists who are the victims of these government agents.¹⁶

The National Economic Council over which the Vice-President presides and which includes the state governors, is a constitutional device designed to help not just to harmonise plans for economic development but also reduce or minimize incidents of conflict between the federation and the states and between states themselves. In theory, therefore, we ought to be able to demonstrate greater harmony on the economic front than we have been able to show. The very much publicized National Economic Empowerment and Development Strategy (NEEDS) adopted by the federal government and put into operation can only work effectively if it is supported by the other two tripods – the State Economic Empowerment and Development Strategy (SEEDS) and the Local Economic Empowerment and Development

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15. The media reported the cases of Ekiti State and Enugu State where the negatively affected local government Chairmen gave detailed information to the EFCC on what happened in their domain.
 16. The involvement of such outfits as Lagos State Traffic Management Agency (LASTMA), Federal Road Maintenance Agency (FERMA), Federal Road Safety Commission (FRSC), Local Government officials, The Nigeria Police on Lagos roads makes the motorists the victims of these conflicts. It is not exactly so in other States or Cities.

Strategy (LEEDS). In reality, we have not witnessed vigorous efforts beyond the federal level although this may not necessarily be the result of a division in government. The understanding of the concepts and their practicalisation may be beyond the capacity of several state government functionaries talk less of local government officials. Much of the conflict we have witnessed have arisen from different definitions of prudence in governance and of what is acceptable behaviour even in a capitalist system which critics call legalized robbery.¹⁷

The three political parties which emerged in 1998/1999 – the All People's Party (APP) the Alliance for Democracy (AD) and the Peoples Democratic Party (PDP) were all children of circumstances. Strange bedfellows sharing different ideological values, were compelled to come together in political parties which were for that same reason nothing but election winning associations. The absence of a common vision of what is good for the Nigerian people and what governance should be all about, led to inevitable conflict and division among the politicians in control of political power and institutions of the Nigerian state. In addition, the constitutional provision for possible re-election for a second term of four years for elected Chief executives at the federal and state levels, had its own problematics as the question of loyalty and trust come to the forefront in political considerations. A serious effort to commence the process of removal of the President for gross violations of the Constitution was witnessed in 2002 but the intervention of well meaning individuals and the Vice President followed by a humbling visit to National Assembly by the President himself, helped to remove the sword which seemed to dangle politically above his head.

The performance of the oversight function by legislators at the federal and state levels had a potential for conflict. As the

17. The build up of funds from public coffers for political party purposes by governors and other public officers, had been penalized with twenty one years in jail by the military tribunals set up under the Buhari/Idiagbon regime. In the present dispensation, this practice has been combined with personal benefits and we have been told by the presidency.

legislators became more aware of what they could do under the Constitution and became emboldened by the weakened moral fabric of the executive, the division within government increased. That division led to efforts, some successful, others not, to change the leadership of legislatures with more pliable speakers. What ought to be seen as a healthy relationship between the executive and the legislature soon became one of “cat and mouse.” At the federal as well as at the state levels, divisions arose the causes of which could not be linked to policy differences but distrust and fear that one side was attempting to undermine and politically damage the other.

The expansion of the democratic space following the Supreme Court decision of December 2002¹⁸ on the issue of registration of political parties, initially gave the impression that the phenomenon of divided government arising from the small number of political parties would disappear. The lack of alternatives appeared to have compelled politicians of different and opposing views to remain in the few parties in existence. However, developments since the controversial 2003 elections, have pointed in the opposite direction. The signals came from the federal level itself. The incumbent President of the Senate and the Speaker of the House of Representatives, had been manoeuvred out of office as they did not return as legislators – a fate that befell a very large number of legislators on the PDP platform.¹⁹ The division in and conflict with the party controlled executive, had resulted in their non return. The nominees of the Vice-President for ministerial positions, were largely ignored by the President who was reportedly uncomfortable with the humiliatingly condescending postures he was forced to adopt before winning the nomination at the convention of the PDP.

18. In the case of *INEC v. Musa* (2002) 17 NWLR Pt 796 p.412.

19. Ayim Pius Ayim and Gali Umar Naaba as President of the Senate and Speaker of the House of Representatives respectively, did not return to the National Assembly, the governors of their states having been used against them at the local level.

That was the beginning of a series of steps which the President gradually took, to reduce the responsibilities, profile and power of the Vice-President which inexorably led to the open split between the two when the President accused his deputy of not being loyal to him in the former's bid to extend the tenure of his office. This was later referred to as the "third term agenda" robustly rejected by the Nigerian people but canvassed by cleptocrats and sycophants in the corridors of power. It is not necessary to go into the details of the conflict within the presidency as the whole world has now been informed of allegations of high level corruption which has existed in the secret chambers of the collective presidency. A divided government indeed!!

The repercussions have been felt at the state level as attempts have been made to remove from office state Chief Executives who were perceived to be friendly with the Vice-President and sympathetic to his presidential ambition for the 2007 elections. Complexity has been introduced in some states where deputy governors have been encouraged to show interest in replacing their governors in the event of removal of the Chief Executive. Division and divided government at the state level in most cases have had nothing to do with conflict of policies or programmes.²⁰ Perceived vaulting ambition on the part of a deputy governor has also led in some states to political initiatives resulting in the impeachment of such elected officers.

Since 1999, we have witnessed the removal of deputy governors and some governors in such diverse states as Sokoto, Abia, Anambra, Bayelsa, Ekiti, Lagos, Akwa Ibom, Plateau, Oyo, Osun. Others are still to come. These activities are obvious manifestations of divided government, a phenomenon that is more disturbing when we realize that unlike the second republic experience when an NPN controlled Kaduna assembly, removed

20. Some divisions such as in Anambra, Oyo, Enugu, Kwara, were caused by political god fathers who in some cases enjoyed the support of Abuja in their efforts to obtain funds from the coffers of the state governments.

a PRP governor of the state, most of the *dramatis personae* involved now are members of the People's Democratic Party. It is not necessary to visit various political assassinations which have occurred since 1999, affecting important government functionaries and aspirants for high office or politicians of great importance in the polity. Where then do we go from here? How do we forestall divided government? Given the historical overview that we have given, is it possible to even prevent all forms, shapes or manifestations of divided government? Can we learn from our history and refrain from being inflicted with the adverse consequences of the phenomenon of divided government? Perhaps one way of minimizing the occurrence is to reduce what is at stake in governance. If we continue to see governance as only providing opportunity to amass wealth using one's official position in a zero sum game of politics, divisions are bound to occur. Where divisions occur as a result of disagreement over looting of the treasury, it is welcome for the exposure of the details of the conflict will help to discourage continuation of the malfeasance. One way of reducing conflict and division, is a constitutional amendment that prevents any elected executive officer in the position of governor or deputy governor, President or Vice-President from contesting for a second term. One term of five or six years should be the maximum allowed by the Constitution. The normal healthy existence of checks and balances between the executive and the legislature which the judiciary adjudicates, should be encouraged as its absence can lead to dictatorship and unchecked corruption. Those holding executive positions should also be encouraged to accept the rule of law and to see governance as an opportunity to serve. Some of the flagrant infractions of the constitutional provisions which we have witnessed, will in future, hopefully reduce in number as participants in the game and art of politics accept to play by the rule and as institutional devices for the checkmating of executive lawlessness and profligacy become

more effective. It is indeed a long road ahead. There is however no alternative to staying the course.

EXECUTIVE - LEGISLATURE RELATIONS

by

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The Context

---the legislative arm --- has been the sick baby of (the) democratic project. It lacks the strength of character that has been seen in the executive. Unlike the executive, the perception of the legislature is one that is made up of political non-starters. Where members are not manifesting a crass sense of infantile idiosyncrasies, they appear irritatingly docile, even timid, to the extent that, as far the generality of Nigerians are concerned; the legislature is nothing but a department under the executive. ----- an executive hand bag.¹ Senator Arthur Nzeribe.

Scholars and observers of Nigerian politics, and persons who are familiar with the activities and personality of Senator Arthur Nzeribe may easily ascribe political partisanship, foxy sycophancy, ego-tripping, sheer mischief or all of these elements in Nzeribe's political character² in his 2004 advertised letter to President Olusegun Obasanjo. Such ascription may be correct yet the Senator is equally correct in portraying these features of the Nigerian legislature, particularly in its first five years of revival as an institutional arm of the country's democratic government. It may even be an under-statement to some

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1. Open letter of congratulations "TO OBJ AT 67," the *Guardian* newspaper, 04 March 2004, p.10
 2. The personality and activism of Chief Senator Arthur Nzeribe since 1983 when he blazed the national political landscape should constitute a monumentally interesting study. To most observers and the Senator's acquaintances, he embodies a mixture of the bad and ugly features of politics, always focused upon and calculating the primacy of his self interest in all enterprises. He is intensively perceptive about political scheming as investment.

observers. Yet some redeeming features have characterised executive/legislature relations in recent times (2005-2008).

Relations between the executive and legislative arms of government in the period since 1999 has been fettered by four social forces³. There has been the continuing force of prolonged dictatorship or sustained authoritarian rule by the military for about 33 of the country's 48 years of independence from colonial rule. Having become trapped in "a praetorian order"⁴ in which social structures and values have been moulded in the fashion of authoritarianism, the executive branch has become unduly dominant in governance. As a consequence – and this is the second factor – constitutional institutions such as the legislature are either stunted in growth or gravely weakened. There was no space to experience the value of law making derived from a representative social order as there was no legislature distinct from the executive in politics and governance. Indeed, many Nigerians who get elected into the legislative arm in the period since 1999 know only little or even nothing about legislation and the legislative process outside the idea and provisions of the constitution.

The third social force is the proceedings of the country's political economy inherited by the 4th Republic. The class character of the economy in which unearned wealth in the form

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3. We have utilised these social forces as explanatory variables in a few other works. For example, see Sam Oyovbaire, "The Structure and Working of Democratic Government: Constitution and Separation of Powers," Paper delivered at the *National Seminar organised by the Peoples Democratic Party*, Abuja: 25th & 26th May, 1999: "Constructive Engagement or Executive Splendid Isolation or Gridlock: Effects on Constitutional Democracy," *Proceedings of the Seminar on Fostering Assembly/African Development Consulting Group*, 2000, pp. 208.
 4. This conceptual perspective of the difficulties of creating and sustaining political order under conditions of transition to democracy is fully dealt with in Tunji Olagunju, Adele Jinadu & Sam Oyovbaire, *Transition to Democracy in Nigeria: 1985-1993*, Spectrum Books, Ibadan, 1993, pp. 1-58. Also S.P. Huntington, *Political Order in Changing Societies*, New Heaven & London, Yale University Press, 1968 for a much earlier postulation of the problems of building constitutional institutions in social change and modernisation.

of corrupt accumulation of state funds and resources by a few individuals has tended to skew power relations away from the majority of the people. The role of money in elections has also made it difficult if not impossible for a large segment of the political class to participate effectively in competing for power. The element of predation in the social relations of power has saddled the legislature with persons who have more consciousness and drive for self service rather than the concern for public service and their constituents.

The site and theatre of material and generally unearned accumulation is the executive branch, and thus the drive for money, favours and contracts has logically converted the executive into the epicentre of power relations.

The fourth factor is that of **personal rule** by the elected executives and others in leadership structures. **Personal rule** is an anti-thesis of constitutional and democratic government. As was well expatiated by scholars many years ago, in a regime of **personal rule**:

“Persons take precedence over rules, the office holder is not efficiently bound by his office and is able to change its authority and powers to suit his own personal rule, the rulers and their appointed leaders take precedence over the formal rules of the political game; the rules do not efficiently regulate political behaviour; and the people therefore cannot predict or anticipate conduct from the knowledge of the rules. The state is government of men and not of laws.”⁵

It is the combination of the above four social forces that, in our view, characterise the context of relations between the

5. Jackson and Rosberg, *Personal Rule in Africa*, 1982 quoted in B.O. Nwabueze, “Echoes on the 1999 Constitution. Who is to Blame – the Razor or the Barber?” *University of Nigeria Nsukka 32nd Convocation Lecture*, 04 October, 2002 p.2.

executive and the legislature. While these forces constrain the legislature, they embolden, bloat and energise the executive branch. Therefore, the problem of relations between the two arms revolves around how to foster and nurture the legislature on the one hand and on the other, how to re-order and refocus the executive, such that a new balance and culture of power relations can be made to grow over time.

However, before examining the experience of executive/legislature relations in the eight years of democratic revival, it is necessary to take note of the role of three other important elements. These are the constitution; the mandate, sovereignty or will of the people; and the character of the political process.

Nigeria operates a presidential constitution and system of government⁶ one cardinal feature of the constitution is the separation of powers among the three arms of government – executive, legislature and judiciary. This feature, principle or doctrine provides an arrangement of checks and balances in the exercise of separate yet co-operative and wholesome constitutional powers and authority.

While specific functions and roles of government are assigned to the separate branches such that the branches do not exceed their powers and authority arbitrarily, governance – especially good governance – is nevertheless wholesome in effect and environment. Constitutional powers and authority are hardly separated both in theory and practice, yet deriving from the long history of constitutional and political development, there are no doubts about the value and benefit of the separation of powers in

6. The country has operated two forms of constitutional government since 1960 when it obtained independence from British colonial rule. The 1960/63 constitution was a parliamentary system in which the executive branch was a derivative of parliament formed by the political party with an elected majority in parliament and responsible to the people (electorate) through parliament. The 1979, 1989 and 1999 Constitutions (2nd, 3rd & 4th Republics) are presidential systems in which the executive and legislature derive authority and legitimacy directly and separately from the people and are responsible to the people directly.

the presidential and modern system of government. This is all the more necessary and justifiable in the chequered experience of democratic government resulting from prolonged military dictatorship.

The presidential system vests the people's mandate, will or sovereignty through an unfettered electoral process in the two branches of the executive and legislature. Both bodies are popularly elected. The National Assembly is an embodiment of the people's will. It is the constitutional assumption that the National Assembly will guide and provide legislation, regulate its own proceedings democratically, guard against arbitrariness and violations of the freedoms and liberties of the people. The National Assembly ensures that the welfare of the Nigerian people is the primary objective of governance. It provides oversight or checks over performance by the executive and, indeed, also over the judiciary. Similarly, executive powers and authority as embodied in the elected presidency in the country and in the office of the Governor of a state, are entrusted with the people's will, sovereignty or mandate of the electorate.

Within the parameters of the constitution, the executive is expected to lead the people in the path of good governance, and to ensure that security of life and property, and defence against external aggression are provided. It is the assumption of the constitution that the executive by itself cannot legislate or make laws for the people. In common parlance, while the legislature legislates, the executive executes. It is the interlocking and dialectical relationship in the responsibilities of the legislature and the executive that provides the environment and context of good governance. The theory of the dual mandate in the presidential system is objectified in good governance. Rather than "an exclusive insistence upon, or a monopolistic claim to the people's will, the theory presupposes co-operative competition for, mutually inclusive insistence upon, and a robust claim to the mandate of the people."

The relationship between the two arms of government is an important dimension of the political process. The structures of this relationship are largely provided in the constitution and other institutions and processes such as the party system, civil society organisations, management of the economy and the global setting of governance. The conduct of the relationship manifests in institutional behaviour of officials of the legislature and the executive who are members of the political class. Where the behaviour patterns of the political class conform with the structural imperatives of the constitutive and regulatory rules of politics, good governance is highly likely to manifest and be experienced. Where, however, the behaviour of the political class manifests in non-conformity with, or in deviance from the structures there is high likelihood of executive/legislature relations negating good governance. Constitutional democracy is obviously a complex arrangement.⁷ The conduct of the political class is critical to the relationship between the two branches of government. There is possibility of development and good governance where the provisions of the constitution, the exercise of the people's will and the proceedings of the political process are organised and conducted without rupture and disharmony.

Unless, and until these three elements of constitutional government exist in sufficient quantum, the people's will and welfare will more often than not, manifest deficits rather than good governance and development.

The Experience: 1999 to 2007

In a fundamental sense, the return from dictatorship to democracy and constitutional government is the return of the legislature as a distinctly functional branch of government. Under dictatorship, the legislature was fused into, or encapsulated by the executive. Law making and law

7. This postulation was long ago satisfactorily offered as an explanatory framework in understanding Nigerian politics. See B.J. Dudley, *Politics and Crisis in Nigeria - Instability and Political Order*, Ibadan University Press, 1973.

implementation were indistinguishable, and the doctrine of separation of powers is a non-matter of serious discourse and practice.

In about eight years of its return and revival in the affairs of the country's governance, the legislature at both the national and state levels of the Nigerian federal system has exhibited and been affected by a number of hiccups.⁸ The hiccups can be classified into three, namely: intra-legislature problems, executive induced problems, and environment imposed problems.

Intra-legislature hiccups are mainly two. Members of the legislature have been generally low in formal education and experience. In the case of experience, however, it has been induced by prolonged military rule. The general impression, however, from personal interaction with legislators is one of gradual growth in improvement. There is progress which has been observed in the 2003/2007 legislative tenure of an outlook of the "older members" taking governance as serious public business. Yet the legislature possesses very low moral bearings arising from a perception index of a free-for-all corruption profile both materially and ethically. Incidentally and contrary to executive preachments, public perception of corruption tendencies applies equally to officials of the executive branch⁹⁽⁹⁾ This implies a deficit in the credibility and even legitimacy of government.

The legislature also suffers from internally induced instability by the frequent tendency to recourse to the impeachment provisions of the constitution against the executive branch even more so against officers of the legislature.

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8. Recall our earlier mention of the four forces of inheritance of a praetorian order, stunted existence of political and governance institutions, skewed political economy and a regime of personal rule.
 9. See the study by a UK government outfit, *Office for Public Service Reform*, Commissioned by the Nigerian government - *Guardian* newspaper, 24th, 25th & 26th March 2004.

The image of the legislature was severely dented by this practice especially in many of the States' Houses of Assembly. It was generally believed that the purpose was more of a tactic to extort material benefits by the legislators rather than to advance the public interest.

As with intra-legislature problems, the executive induced hiccups are two. First, there is the problem of the executive struggling to adjust to the constitutional fact that government in a democracy does not mean the executive alone. The tendency for the executive to act as if constitutional powers and authority vest on it alone tend to manifest in acts of manipulation, intolerance and even subversion of the legislative arm. The executive exhibits undue interest in the internal election or selection of the leadership of the legislature, and when it is not possible to do so, it induces instability in the legislature. Second, there is the tendency to ignore adequate budgeting and to provide necessary infrastructure for the legislative branch. Similarly, the executive tend to perceive the assertion of any measure of autonomy and independence by the legislature as competition rather than as a complement for the work of the government. This two-fold problem has been a grave source of harassment of the legislature in its eight years of renewal and existence.

There is the third area of problem in the relationship between the legislature and the executive and this has to do with the external environment within which the legislature functions. It involves the fact that legislators like most other Nigerians having no authority or access to disburse resources and favours, confront and grapple with a political economy of poverty and greed. There is therefore the temptation to expand and deepen corruption rather than to check, reduce or even eliminate corruption. There is also the culture and economy of affection which afflicts the legislative branch. The demands of legislators' plural constituencies tend to clutter their behavioural and social relations. Finally, the role of the political party system in the relations between the two branches remains unclear and

indecisive. Unlike the parliamentary system, the presidential arrangement was introduced so as to reduce the phenomenon of "the politics of the party in power" and of "zero-sum syndrome" in governance. It will be recalled that this same problem afflicted the politics of the 2nd Republic and contributed to its collapse in December 1983.¹⁰

There is a vast terrain of relations between the executive and the legislature in the past eight years but we wish to identify and comment only on a few areas of experience.

National Assembly Leadership

This is one area that triggered off the down side in the relationship between the two branches in 1999. In the first legislative tenure, the National Assembly was highly fettered by undue interference in choosing its leaders by the executive. The Senate was more affected in this matter than the House of Representatives. The politics of choice of the President of the Senate was particularly instructive.

Working with a portfolio inherited from military rule, personal rule regime, negative perception of politicians as a class rather than seeing the legislature as a complementary constitutional institution of government, as well as what observers called a "messianic complex," the executive branch proceeded to foist upon the Senate its preferred President, Chief Evan Enwerem. Consequently, Enwerem became a liability of political and moral proportions leading to his displacement and subsequent replacement within four months by Dr. Chuba Okadigbo¹¹ who was the original preference of the Senate. The executive was

10. The literature on this phenomenon is vast but two good examples are: R.A. Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, Cambridge University Press, 1987; and S. Mohammed & T. Edoh (eds), *Nigeria: A Republic in Ruins*, Department of Political Science, Ahmadu Bello University, Zaria, 1986.

11. Dr. Chuba Okadigbo had a lot of trauma in his later political career leading to his switch from the PDP to the opposition ANPP, and subsequently an untimely death in late 2003.

gravely discomfited and it proceeded to induce instability in the Senate.

The apparent tactlessness of Okadigbo's leadership made it easy for the executive to outmanoeuvre the situation for his replacement as Senate President. In his place, an executive induced Chief Anyim Pius Anyim was made President of the Senate being the third Senate President in under 18 months.¹² The underlining force in the debacle of the making of the Senate President was an undue concern by the executive about not wanting a strong legislative branch as he is also the political leader of the two-chamber legislature.

By the end of the first tenure of the Senate, it had three Presidents, namely: Chief Evan Enwerem, Dr. Chuba Okadigbo and Chief Anyim Pius Anyim. The second legislative tenure (2003/2007) fared only little better than the first tenure. The manipulation of the executive arm of the National Assembly leadership began with the suspicious manner in which Chief Adolphus Nwagbara assumed the leadership; and in a period of less than two years, he too, perceived largely as an executive stooge, was replaced by Chief Ken Nnamani. On the whole, the Senate leadership managed a fairly average profile and image in the past eight years. While it can be argued that it was a product of the recent renewal of the legislature, there has been no doubt about the over-bearance of the executive branch on this matter.

In the case of the House of Representatives, the executive branch was cut down early in its attempt to saddle it with a young member of dubious character who was exposed and indicted for forgery and lying about his age and educational qualifications. Alhaji Salisu Buhari was disgraced and forced to leave the legislature both as Speaker and Member of the House of Representatives having been convicted for criminal conduct. Embarrassed and worried, the executive allowed the House to

12. Details of the feud, mutual suspicion and foxy rivalry as well as executive fears about a possible successful impeachment of the President by the National Assembly do not belong here

have its way without undue interference to elect Alhaji Ghali Umar Na'abba to replace Buhari as Speaker.

It was a slip from which the executive suffered considerable discomfiture in relating to the House of Representatives all through the 1999-2003 legislative tenure. The 2003-2007 tenure was piloted relatively successfully by Alhaji Aminu Masari as Speaker, who has been able to steer a balance of legislative and managerial causes between members of the House and the executive arm.

There was an interesting aspect of the leadership experience in the National Assembly. While disgraced Salisu Buhari in the House of Representative as well as Evan Enwerem and Nwagbara in the Senate were publicly perceived as "stooges of the executive branch" by their undue collaboration with the Presidency, Ghali Na'abba and Chuba Okadigbo as well as Ken Nnamani provided a contrast as the legislature was generally perceived as having performed its constitutional role relatively independently of the executive with the image of a counterpoise through checks to "executive excesses." The leadership of Anyim Pius Anyim was concocted initially in the mould of a stooge of the executive but out of "frustration and his reaction to executive humiliation," Anyim turned around later as providing exemplary leadership to the National Assembly.

On the whole there has been a seemingly fair balance in the image index of leadership of the legislature in relation to executive manipulation of the constitutional process.¹³

Law Making

The functions of law making provides another arena for understanding executive/legislature relations. The Constitution empowers the legislature to make laws for the peace, order and

13. This interpretive view is highly tentative. There is an emerging show of admirable autonomy and strength of institutional character by the National Assembly against the executive branch.

good government of the federation or the state, as appropriate¹⁴ In doing so however, the legislature depends very largely on the executive branch. The process involves two kinds of legislative proposals otherwise called bills. It is common knowledge in democratic countries that over ninety-five per cent of bills are proposed by the executive branch.

Such bills are normally referred to as public bills. The remaining small percentage of legislative proposals – private bills – normally emanate from members of the legislature.

The dominance of the executive in this matter in the Nigerian experience since 1999 is overwhelming. Private legislative proposals hardly got off the ground in either the House of Representative or the Senate. It is the process of turning public bills into law or Acts that have provoked uneasy relations between the two branches.

The public perception of the process tends to portray inflexibility on the part of the executive once its mind is made up and has requested the legislature to act. Amendments and fairly thoughtful suggestions to cater for the larger public interest as perceived by the legislature tend to be rebuffed by the executive. We should recall here “the messianic complex” of the executive which was referred to in this essay previously. In this connection “controversial bills” are protracted in the legislative process, and when they are passed by the National Assembly with amendments, they hardly received Presidential assent. Similarly, when a bill which is resented by the executive is passed into law by the National Assembly, it is hardly implemented by the executive adequately and faithfully.

Two illustrations may suffice. First, is the public bill to establish the *Niger Delta Development Commission (NDDC)*. It is one of the earliest proposals placed before the 1999-2003 National Assembly. But for well thought-out proposed amendments to the bill by the immediate stakeholders in the

14. See the main provision in sections 4, 5 and 6, and chapters v, vi and vii of the 1999 Constitution.

Niger Delta (states, communities, civil society organisations, principal actors, etc. as well as sympathetic legislators, the executive arm was unduly provoked to no end; and when it was finally passed against the desires of the executive, the President withheld assent to it. The face-off between the legislature and executive provoked the invocation of the appropriate provision of the Constitution by the legislature to override presidential assent.¹⁵ The NDDC was accordingly established without the normal Presidential assent as an Act.

In the same vein, when the executive returned subsequently to the National Assembly for an amendment of the NDDC Act, it was equally opposed by stakeholders and as a result the proposed amendment was in limbo for a long while. Yet, this was a major project and structure to deal with the menace of underdevelopment, injustice and poverty in the oil producing region. The bill became law virtually against the wish of the executive.

The second illustration is what can be described as an avoidable blunder by the executive over the sharing of that proportion of funds from the federation account based on the principle of derivation as it affects on-shore/off-shore sources of oil production. The controversy, heat, bitterness, and anger and intimidation experienced in the matter do not belong here. It suffices to recall that based on a Supreme Court judgement in April 2002, littoral states were denied the benefit of allocation of revenue to them from oil production in off-shore sources. In order to resolve the highly predicted political impasse, the proposal for an Act to override the High Court judgement was taken up by the executive with the National Assembly. Again, arising from a clash of undue perception of power between the two arms, the processing of the bill was held up for upward of two years at the painful consequences for, and agony by the affected states. The matter was only resolved by the President's

15. See section 58(5) of the 1999 Constitution.

assent to the bill in early 2004. Yet, this was another major issue of fiscal federalism affecting the mineral producing regions.

In these illustrations, the underlining point revolves around untidy conduct of the relations between the executive and the legislature. On the whole however, the fact that the legislature held on to its views and position on the illustrated cases provide some light in the tunnel for a much more enhanced and balanced development of the relations between the two arms in the future.

Budget (Public Finance) and Implementation

It is a constitutional requirement that only the executive branch prepares and presents budgets or proposals on public finance to the legislature.

Yet, one major function of the legislature involves scrutiny and passing of budget proposals and all public finance bills for assent by the President including enactment of new taxes or amendment of any old taxes.¹⁶ It is the legislature that also acts as a “watch dog of public funds” in which capacity it exercises power to audit public finance and investigates the affairs of government ministries, departments and agencies in the use of public funds. It is the legislature that authorises expenditure from the consolidated revenue fund. The budget bill is the basis for management of the economy annually by the executive, including the running of government. The budget, therefore, takes on the entire economy as a whole and it provides the basis for understanding even the activities of the private and informal sectors of the economy and of the flow of goods and services into and out of the country.

The matter of the annual budget or appropriation bill has been a sore point in relations between the legislature and the executive in the past eight years. Unlike the period before 1999

16. See sections 80, 81, 82 and 83 of the 1999 Constitution. An insightful analysis of this subject matter was done by Prof. D.A. Guobadia in “The Legislature and Good Governance under the 1999 Constitution”, in I.A. Ayua, D.A. Guobadia & A.O. Adekunle, *Nigeria: Issues in the 1999 Constitution*, Nigerian Institute of Advanced Legal Studies, Lagos: 2000, chapter 3.

when a new year's budget was law in January, budget proposals between 1999 and 2004 often left the executive branch for the legislature late in the preceding year and they, therefore, got considered equally late in the current year. In fact, the budget for the year 2001 and 2002 were hardly approved before the subsequent budgets began to be prepared. In this connection, the private sector which is being unduly propped up by the present regime as the main lever or engine of the national economy (operators/corporate, institutional, individuals and peti-actors) has been experiencing huge problems in their operational projections. There was no doubt that the structural confusion over timing and implementation of budgets became part and parcel of the gross deficits of democratic governance. But these deficits have, since about 2004, began to be addressed and reduced by timely preparation and presentation of the national budgets.

On the part of the legislature, there is a strange tendency increasingly becoming a phenomenal practice to, not only scrutinise the veracity and realism of the appropriation bill (budget proposal) but also to increase the over all size of the budget. Usually, the hard facts upon which budget proposals are made derive from the executive and not from the legislature. All of these have tended to spoil the relations between the two arms, more so for the public suspicion that additions to the budget are more for partisan and self oriented purposes and interests rather than public objectives. In the first legislative tenure (1999-2003), the National Assembly added a number of items in the budget of 2001 and 2002, as for example, projects for Member's constituencies. The debate over the propriety of this matter lingered on and spoilt relations between the two arms and the budget was hardly implemented including releases of funds by the executive for recurrent expenditure let alone the capital/developmental dimensions of the budget.

Even when the budget is signed into law, the legislature has constitutional responsibility to invigilate its implementation. This may involve auditing of the accounts or calling appropriate officials to appear before the relevant committees of the national assembly. The main purpose of this legislative power is one of seeking clarification and understanding but it may also involve investigation of default and to impose sanction or punishment.¹⁷

It is also for this purpose that the appropriate provision of the constitution creates the office of the Auditor-General of the Federation with responsibility for auditing public accounts and for reporting directly to the legislature. As the Auditor-General is empowered to have access to all books, records and other documents relating to the accounts of the executive branch, it is constitutionally expected that the office should operate independently of the executive.¹⁸

But the operation of the Office of the Auditor-General and also that of the Accountant-General have, since 1999, run into two areas of problem for executive/legislature relations which portend fear of possible compromise of interest in a multi-ethnic federal structure. Officials who occupy the position of Auditor-General and Accountant-General are expected by a provision of the constitution on federal character to belong to ethnic or nationality groups separate from each other and from that of the President of the country.¹⁹ This was not so for a while. In fact, one sore point in executive/legislature relations was that the Auditor-General and Accountant-General were, for a while, members of the same nationality group, and of the same nationality group with the President. There were fears, real or imagined, of compromise of interest. Secondly, the audited financial statements of the two offices have tended not to be as speedily provided so as to be of help to the legislature as a watch

17. See sections 88 and 89 of the 1999 Constitution

18. Section 87.

19. Section 14.

dog of public funds. The situation appears to be one of creative confusion.

Impeachment or Removal of the Chief Executive Officer

It is often acknowledged that the ultimate weapon provided by the constitution as a check against the presidential executive is the power of removal from office consequent upon proven "gross misconduct" in the performance of responsibilities by the President or Governor of a state as the case may be. Sections 143 and 148 of the 1999 Constitution are quite clear but demanding. What, however, is highly contentious is what constitutes "gross misconduct" in the affairs of governance.

Relations between the executive and the legislature are usually assumed to be positively sustained if the executive is constantly reminded of the impeachment clause. But this provision of the Constitution is more of effect or consequence than the cause of any unhealthy relations. In the past eight years, the National Assembly, particularly under the leadership of Chuba Okadigbo and Ghali Na'aba and also during the period when relations were perceived to be sour between the executive branch and Pius Anyim, had recourse on a number of occasions to threaten the use of impeachment. On each occasion, the matter fizzled out after undue heat of the polity.

It is generally expressed for the legislature that alleged breaches of the constitution notwithstanding, it is the style and temperament and personality of the President, and particularly the poor or non implementation of approved budgets that have caused the legislature to resort to impeachment threat. For the executive, the perception is that members of the legislature have been impelled by greed and the blackmail for corrupt funding rather than the assessment of the objective performance of the executive.

On a few occasions, in the second legislative tenure (2003-2007) when the resort to impeachment threat was dangled, it fizzled out even in the glare of gross misconduct by the executive

branch. On the whole, the resort to the provision for impeachment and removal of the President has been perceived as more of a mischievous stick when executive carrots are unavailable rather than as an instrument to sustain good governance. The essence also implies a continuing search for developmental relationships between the two branches of government.

Informal Structures and Processes

Although not specifically provided for in the Constitution, relations between the executive and legislature can derive nourishment from informal structures and processes such as the political party arena and the personal bearings of the leadership of the two branches of government.

In the past eight years, both the executive and the majority members of the legislature have emanated from one political party - Peoples Democratic Party - which maintains overwhelming majority not only at the national level but also across the states (21 out of 36 states - 1999 to 2003; and 29 out of 36 states - 2003 to 2007). Largely barren of ideological discipline, driven by cliques of interest in the fashion of a mafia rather than modern politico-bureaucratic organisation coupled with the struggle for linkages with the hierarchy of resource advantages, the PDP has found it difficult to promote and sustain positive relations between its elected members who dominate the executive on one hand and the legislature on the other. Indeed, the threat to use impeachment provisions and the mutual challenge of the authority of each other about budgetary allocations, budget execution as well as appointment of officials and policies for regional development across the country have all been conducted within the PDP rather than meaningful opposition from outside the PDP. In the process, the party has not been organised to aid appropriate relations between the two branches of government.

Once when the impeachment threat appeared quite real, the party quickly organised a typically Nigerian fire brigade relationship between the two branches in which the party took on a role of power brokerage, but once the issue at hand at that time petered away, the relationship also ceased. In the second legislative tenure, the Board of Trustees of the party appears to want to revive an arrangement of constant dialogue between the two branches. While the motive for this is generating diverse interpretations, there is really no reason why the party whose members dominate the two branches should not aid the institutionalisation of non formal relations between the two branches of government so as to foster dialogue and reduce undue policy and personality frictions.

This matter of the poor role of the party in executive/legislature relations became very sorely counter-productive since 2005 when the President, in the rabid bid to personalise control of the PDP, decided to dislodge party officials, members and structures who were notably faithful to the Vice-President. The bid to take over control of the party and the resultant sour relations between the President and his Vice were transferred to the relations between the executive branch and the National Assembly.

The States

In the case of the states, the experience can be argued to be less problematic, yet, not necessarily positive in aid of development. One dominant feature is the overwhelming personality of the Executive Governor over the state Houses of Assembly and in all activity sectors of the state. Government is the Governor and Governor is the government. In this manner of perception and functionality, the legislature virtually "goes to sleep", in a manner of speaking, when the Governor is not in the state.

The relations between the two branches, therefore, has tended to take one of two forms in each state, namely: complete cooperation and subservience or of hostility and political bitterness. In the first case scenario, the metaphor of the

legislature being a "handbag of the executive" conveys a situation of non-conflict or of merely waiting for executive bills to be passed by the State House of Assembly. In this arrangement too, the engine of the legislature is constantly oiled by the executive. There is less talk about executive excesses let alone impeachment threats.

In the case scenario of adversary relations between the two, the legislature is constantly hostile and therefore demanding for attention about issues in the state. Public attitudes to the adversary relations are two fold. One, the executive may not even cooperate in funds allocation institutionally and as carrots in its relations with the legislature. Two, it is also perceived that the person of the Governor may be creating public offence which the legislature is prone to resist. It is then that relations tend to break down and an impeachment threat may be concocted to manifest. Adversary relations between the two branches of government have been experienced by a number of states in the past eight years. The contents are complex and they change from time to time, sometimes openly induced and carrotted from the Federal Government. Examples of States with the "hostility experience" include: Anambra, Enugu and Abia in the South East; Bayelsa in the South-South; Ekiti, Oyo and Osun in the West; Benue and Plateau in North Central; Adamawa, Taraba in the North East; and Zamfara in the North West. It is difficult to assign development to relations between the two branches in the states. While cooperation and subservience may serve the interest of the executive, it does not necessarily amount to the growth of the legislature as a constitutional institution for good governance. In the same way, an adversary or hostility syndrome cannot generate development in the relations between the executive and the legislature.

Conclusion

Our concluding view is that the relations between the two branches of government is one of creative confusion. Eight years after the return from military dictatorship to constitutional government, it is hardly clear to perceptive observers whether the legislature can be imbued with developmental autonomy and independence and as a counterpoise to the executive. Under dictatorship, the executive was not only sustained in authority, it also encapsulated the role of the legislature. Arising from the concentration of powers and de-federalisation of the system, the executive was highly bloated in power; and indeed it could be described as "over developed". It equated government with itself as aided by a regime of personal rule. The executive inherited most of the constitutional, social and economical features of governance that converted it as the dominant actor rather than a partner in the affairs of government.

With the return to constitutional government and democracy and thus revival of the legislature, government and the nation have had to grapple with institutionalising the legislature and providing the appropriate space for it to exist and to carry out its responsibilities. This is the problem in the relations between the two branches.

In the past eight years, there has not been enough investment on the legislature in terms of responsibility for fiscal autonomy, building infrastructure for its operation and detaching it from the apron strings of the executive. The legislature requires detached yet co-operative and complementary existence to the executive. *Until there is a dignified balance in relations between the two branches, it is difficult to perceive a process of healthy growth and development in the constitutional responsibilities of the two arms to provide good governance. The executive branch should learn to see itself less as the government; and the legislative branch should learn not to be perceived, as, in the words of Senator Arthur Nzeribe "a department of the executive or an executive handbag."*

EXECUTIVE IMMUNITY AND PUBLIC
ACCOUNTABILITY:
THE NIGERIAN EXPERIENCE

by

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Introduction

The immunity from criminal and civil suits conferred upon members of the executive arm of government has come under severe criticism in recent times. This immunity, according to many, shields members of the executive from responsibility for criminal offences including corruption committed by them while in office.¹

The executive arm of government is one of the three arms² as provided for under the 1999 Constitution of the Federal Republic of Nigeria. As Idigbe JSC stated in *Adesanya v. President*.³

“Under our Constitution, government is divided into three separate and independent sections, viz: the legislature, the Executive and the Judiciary; and it is, I apprehend, the duty of each section to avoid encroachment by one on the sphere of the others.”

The executive arm is made up of the President, the Vice-President, the State Governors and the Deputy-Governors.⁴

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1. See for example, Femi Falana in “What happened to Nigeria’s \$12bn Oil Windfall of 1991” at www.gasandoil.com/GOL/news/nta63739.htm visited on 09/10/06.
 2. The others are the Legislature and the Judiciary. See sections 4 and 6 of the 1999 Constitution.
 3. (1981) 2 NCLR 358 at p.455.
 4. See section 5 (1) and (2) of the 1999 Constitution.

These members of the executive are, by the nature of their offices, given the power to run the affairs of the country in accordance with the provisions of the Constitution and the law. They are however, also imposed with the duty to do so in the spirit of the Constitution and for the welfare of the citizens.⁵

The debate on the repeal, retention or review of the immunity clause conferred on members of the executive by the Constitution has become topical in recent times. This is as a result of the alarming rate of abuse of this clause. The duty of public accountability has in many instances taken the back seat. Cases of huge financial impropriety among other crimes have been leveled against several State Governors and other members of the Executive who, as a result of the protective shield of the immunity clause carried on with their duties.

This chapter will highlight the forms of the immunity and the rationale for its inclusion and retention in the Constitution. It will consider the strong and weak points of executive immunity in the light of the frequent cases of abuse and disregard for the duty of accountability to the citizens which should be of paramount importance. Oluwadare Aguda⁶ put it thus:

“Therefore, the duties of the Executive set out in the Constitution are in fact no more than the high points of the functions of the Executive, the summary of which in reality amounts to this: the welfare of the people.”

Arguments will be made for and against the retention of the immunity clause in the Constitution in the light of present realities and recommendations will be given as to which

5. This can be deduced from some aspects of the procedure as contained in the Constitution for their removal through the discretion of the Legislature which is assumed to represent the will of the people. See sections 143 and 188 of the 1999 Constitution.

6. Oluwadare Aguda: *Understanding the Nigerian Constitution of 1999*, MIJ Publishers, Lagos, 2000, p. 162.

direction to go against the backdrop of the political and economic make-up of Nigeria's nascent democracy.

Forms of Constitutional Immunity

The term *Constitutional Immunity* refers to the lawful exemption from prosecution of the duties required of the functionaries of government particularly in reference to the duties of the legislative, executive and judicial arms of government.⁷ Constitutional Immunity has been in existence in the Constitutions of Nigeria since 1963.⁸

Legislative Immunity protects members of the legislative arm because the powers and privileges granted them in the performance of their legislative functions makes it impossible for anyone to sue a member of the Legislature on account of his act or omission in the performance of his legislative duties both in the full Legislative House and at the Committee stage. The Legislative Houses (Powers and Privileges) Act provides that:

"No civil or criminal proceedings may be instituted against any member of a Legislative House:

- a) In respect of words spoken before that House or a Committee thereof; or
- b) In respect of words written in a report, to that House or to any Committee thereof or in any petition, bill, resolution, motion or question brought or introduced by him therein."⁹

The Immunity granted members of the Legislature is necessary for the effective performance of their duties as

7. See John Ademola Yakubu: *Constitutional Law in Nigeria*, Demyaxs Law Books, Ibadan, 2003, p. 245.

8. In the 1963 Constitution, it was contained in section 161, section 267 of the 1979 Constitution and section 308 in the 1999 Constitution.

9. Section 3 Legislative Houses (Powers and Privileges) Act, Cap. 208 Laws of the Federation of Nigeria 1990. Sections 315 of the 1999 Constitution deals with the preservation of existing laws prior to the promulgation of the 1999 Constitution.

stipulated by the Constitution, having the important duty of making laws.¹⁰

Judicial Immunity derived from the common law rule gives Judges immunity from civil liability in respect of acts done or anything said by them in the course of their judicial functions. This has been codified in the various Court Laws of the States.¹¹

Executive immunity which is the main trust of this chapter is however much broader than the two types above and is discussed below in more detail.

Constitutional Provisions on Executive Immunity

The Constitution¹² gives the President, the Vice-President, the State Governor and the Deputy-Governor only,¹³ complete immunity from all court processes as long as they hold such offices. Section 308 (hereinafter referred to as the Immunity Clause) which contains the provision on immunity states as follows:

- (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:
 - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
 - (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
 - (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings

10. See section 4(1) and 4(6) of the 1999 Constitution.

11. See also *Egbe v. Adefarasin & Anor* (1985) 16 NSCC, part 1, p.643.

12. Section 308, 1999 Constitution.

13. It does not confer this immunity on members of the other two arms of government such as the President of the Senate or the Chief Justice of Nigeria.

- against a person to whom this section applies, no account shall be taken of his period of office.
- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
 - (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy-Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

The above provisions may be summarized therefore to mean that during the tenure of office the President, Vice-President, Governor and Deputy-Governor, no civil or criminal proceeding may be instituted or continued against them and they may not be arrested or imprisoned. Also, no court process requiring or compelling their appearance in court may be applied for. Courts are prohibited from issuing any such process. Any application of other provisions of the Constitution which may work against the immunity of such officials are suspended in relation to their actions during the period of their immunity.¹⁴

In the case of *Ejura v. Idris*,¹⁵ the question arose as to whether the constitutional immunity under section 308 of the Constitution applies to election petition matters. In that case, the Governor of Kogi State was stated by the appellant to have supplied false information on his Independent National Electoral Commission (INEC) Form. The suit was therefore brought that an injunction be pronounced restraining him from further parading himself as the Governor of Kogi State. The issue

14. An example is the Chapter IV on Fundamental Human Rights. See also Oluwadare Aguda, *op.cit.*, p.179.

15. (2006) 4 NWLR, Part 971 at p. 538.

therefore arose as to whether the High Court had the jurisdiction to entertain the case, having regard to the provisions of section 308 of the Constitution.

In providing an answer to the question as to whether or not the Immunity Clause under section 308 of the Constitution applies to election petition matters, the Court of Appeal stated as follows:

“Where the election of the President, Vice-President, Governor or Deputy-Governor are questioned in an election tribunal, the provisions of section 308 of the Constitution no longer applies. But the provisions of section 21(5) of the Electoral Act, 2002 can only operate to remove an elected Governor if the said provisions are invoked before an election tribunal. In this case, the 1st respondent, the Governor of Kogi State can only be removed by a successful petition heard by an Election Petition Tribunal. Since, the appellant sought to remove the Governor by an originating summons filed before the Federal High Court, the provision of section 308 of the Constitution protects the Governor from such a civil proceeding, notwithstanding the provision of section 21(5) of the Electoral Act, 2002. The trial court was therefore right to decline jurisdiction in the light of the clear provisions of section 308 of the Constitution.”¹⁶

The Constitution however is specific about the fact that the immunity is granted only in the personal capacity of such office holders and not in their official capacities or to civil or criminal proceedings in which such a person is only a nominal party.¹⁷

16. *Ibid*, p.547.

17. Section 308(2).

Therefore, in the case of *Abacha v. Fawehinmi*,¹⁸ the applicant who was arrested and detained on the orders of the then Head of State filed an application at the Court. Among issues brought up in the cross-appeal was the question as to whether the 1st cross-respondent, as Head of State of Nigeria is immune from civil and criminal actions in all cases. Even though the question of the scope of immunity provided for protection of the President, Vice-President, Governor and Deputy-Governor only arose as *obiter* in this case, Justice Uwaifo JSC considered an observation made by the Court of Appeal as “a rather expensive *obiter*, quite capable of misleading the unwary and therefore deserves to be corrected at the first opportunity.”¹⁹ At the Court of Appeal, Pats-Acholonu JCA (as he was then) made a passing remark which did not form part of the decision and was therefore not a subject of appeal, as follows:

“When I look at this case, I observe that one of the respondents is the Head of State – General Sani Abacha himself. I wonder whether the appellants are unaware of the provisions of section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution.”

Correcting the erroneous observation, the Supreme Court stated that the immunity provided by the constitution does not

18. (2000) 6 NWLR, Part 660 at p. 228.

19. See p.275, *Ibid.*

apply to the person in question in his official capacity or to a criminal or civil proceeding in which he is only a nominal party. In this case, the section of the Constitution referred to had been suspended by Decree No. 107 of 1993 and even if it were not suspended, its provisions would not apply since the Head of State was sued in his official capacity.²⁰

The Constitution also specifically provides that the right to start and continue proceedings against such members of the executive is not permanently abrogated but only suspended during their tenure in office.²¹ The Supreme Court in *Tinubu v. I.M.B. Securities*,²² was faced with the issue as to whether, having regard to the entire provisions of section 308 (1) (a) of the Constitution, proceedings in respect of civil action against the appellant who was (and still remains) the Governor of Lagos State in his personal and private capacity can be properly continued during his period of office as Governor. Relying on section 308, the Court of Appeal had adjourned the case *sine die* to be re-listed only when the appellant vacates the office of Governor of Lagos State. The Supreme Court, following the reasoning in the earlier case of *Colonel Olu Rotimi and Others v. Macgregor*²³ set aside this consequential order, substituting it with an order striking out the interlocutory appeal with the liberty to relist it after the appellant's tenure as Governor. He therefore cannot take account of his tenure to claim that the matter has become statute barred.

Investigation and Prosecution of Officers covered by the Immunity Clause

The issue as to whether or not persons who enjoy immunity from criminal and civil suits under the Constitution also enjoy immunity from investigation into an alleged crime by the police

20. See Lead Judgment *per* Ogundare J.S.C. at p.297.

21. See the proviso to section 308(1).

22. (2001) 16 NWLR Part 740 at p.670.

23. (1974) 11 S.C. 133. This case was decided based on section 161 (1) of the 1963 Constitution which contained the Immunity Clause in that Constitution.

has gained prominence in recent times in light of the investigations being faced by several members of the executive.²⁴

The Constitution under section 308 provides immunity from arrest and prosecution of persons protected under it. Such immunity is however not extended to the investigation of an alleged offence by such a person. There is no constitutional provision which grants immunity to the President, Vice-President, Governor or Deputy-Governor from investigation into an alleged offence.

The question as to whether or not persons named in section 308 (3) of the Constitution have immunity from investigation under the Immunity Clause came before the Supreme Court in the case of *Fawehinmi v. I.G.P.*²⁵ The main issues that arose in that case which involved alleged crimes committed by the governor of Lagos State, Governor Ahmed Tinubu against certain sections of the Criminal Code of Lagos State²⁶ were:

- Whether Governor Bola Tinubu in particular and persons named in section 308(3) of the Constitution have no immunity against investigation under section 308; and
- Whether the provision of section 4 of the Police Act²⁷ allows for the exercise of discretion by the Police on whether or not to investigate allegations of crime.²⁸

The Supreme Court in this case, found no support for the argument that police investigation is a part of criminal

24. Gani Fawehinmi (SAN) for instance examined the constitutional implications of the Economic and Financial Crimes Commission Report and the Administrative Panel of Inquiry Report into allegations of misconduct by serving Vice-President, Atiku Abubakar. See *Thisday Law, Thisday*, September 19, 2006, pp. 48 and 51. (2002)7 NWLR, Part 767, at p.606.

26. Sections 191 and 192 of the Criminal Code, Cap. 32, Laws of Lagos State, 1994.

27. Cap. 359, Laws of the Federation of Nigeria, 1990.

28. See p. 610 of Report, *op.cit.*

proceedings as envisaged under section 308 (1) (a) of the Constitution. Even though the findings, results or conclusions of such an investigation could lead to criminal proceedings, criminal proceedings do not include police investigation as an act.²⁹ This flows from the fact that the investigation of a criminal complaint by the Police is a preliminary course which may or may not result in a criminal prosecution.³⁰

In the case of *Asakitikpi v. State*³¹ the Supreme Court unanimously held as follows:

“Trials in criminal cases commence with the arraignment of the accused person and arraignment in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon...”

The Constitution³² provides for the Police Act.³³ Under the Police Act, the Police are given the duty to prevent and detect crime, apprehend offenders, preserve law and order, protect life and property and enforce all laws and regulations with which they are directly charged.³⁴

It is generally accepted by the Courts that even though the Police have the public duty to take due measures for the purpose of enforcing the law, a substantial margin of discretion is conceded to them as to the appropriate method of enforcement

29. Per Uwaifo, J.S.C at p.680 of Report, *ibid*.

30. See *Asakitikpi v. State* (1993) 5 NWLR, Part 296, p.641.

31. *Ibid.* at p.645, see also *Oyediran v. Republic* (1967) NMLR Part 122, p.652.

32. See section 214(1).

33. Cap. 359, Laws of the Federation, 1990.

34. Section 4.

without risking judicial interpretation³⁵. The Court will therefore only interfere in obvious and exceptional circumstances.³⁶

The Police however clearly has a duty under the Police Act to investigate and preserve evidence of crime even if such evidence cannot immediately be used legally in a criminal investigation. They would therefore normally use their discretion well in such circumstances.

Even though investigation may not lead to the immediate arrest and prosecution of persons protected by the immunity clause,³⁷ it may be useful for the purposes of impeachment by the House of Representatives or the State Houses of Assembly.³⁸ This was used recently to achieve the removal of former Governor of Bayelsa State, D.S.P Alamieyeseigha after he was arrested in the United Kingdom on money laundering charges. It may also be used for the prosecution of such persons after they have left office.³⁹

The Duty of Public Accountability

The Constitution imposes on the President, Vice-President, Governors and Deputy Governors the duty to comply with the provisions of the Constitution in running the affairs of government as well as in their conduct of the affairs of the nation

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35. Through the writ of Mandamus to order relief in respect of the infringement of a public right or duty and where no effective relief can be obtained in the ordinary course of action.
 36. See *Fawehinmi v. I.G.P.*, *op.cit* at p.646., See also *Per* Lord Denning M.R. in *R v. Commissioner of Police of the Metropolis ex parte Blackburn* (1968) 2 Q.B. 118 at 136.
 37. See for example the case of Governor Joshua Dariye of Plateau State who was questioned on money laundering allegations in the United Kingdom, and returned to Nigeria to continue in his office as Governor; The Deputy Governor of Delta State, Benjamin Elue who was investigated for gun-running was also protected by the immunity clause. See Olu Obafemi: "Resurrecting the Debate on Executive Immunity," *Daily Sun*, January 20, 2004, back page.
 38. See section 188 of the Constitution. The Constitution uses the word "removal" as opposed to "impeachment."
 39. See *Tinubu v. I.M.B Securities*, (*supra*).

as a whole. Public Accountability simply put, is the responsibility of public officers and institutions to the populace, including a willingness to submit to scrutiny.⁴⁰

According to the Constitution, executive power shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.⁴¹

It also states that such executive powers shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws.⁴²

By the nature of their offices, the President and the State Governor are given the power, and also have imposed on them, the duty to run the affairs of the nation, not only in accordance with the provisions of the Constitution and the law, but also in the spirit of the Constitution and for the welfare of the people.⁴³

Government is primarily set up to ensure the security and welfare of the people.⁴⁴ Sovereignty, in the words of the Constitution belongs to the people from whom government through the Constitution derives all its power and authority.⁴⁵ The Constitution ensures the participation by the people in the government.⁴⁶

Going by the procedure laid out in the Constitution for the removal of such persons, it is largely at the discretion of the

40. See Bolaji Owasanoye: "Transparency, Accountability and Good Governance under the 1999 Constitution" in I.A. Ayua *et al eds: Issues in the 1999 Constitution*, 2000, Nigerian Institute of Advanced Legal Studies, Lagos, p.235.

41. See section 5(1) (b) of the 1999 Constitution.

42. See sections 5(1) (b), *ibid.*

43. See Oluwadace Aguda: *op. cit.*, p.161.

44. Section 14 (2) (b) of the 1999 Constitution.

45. Section 14 (2) (a), *ibid.*

46. Section 14 (2) (c), *ibid.*

legislature, that is, the elected representatives of the citizens.⁴⁷ Even though it can be argued that political interests might play a larger role than the people's welfare in the use of this legislative discretion, it is in the spirit of the Constitution that such discretion be used for the national interest.

The expectations of good-governance by the people is mainly vested in the President, Vice-President, Governors and Deputy-Governors. They, as well as the other organs of government, have the economic objectives to, among others, "harness the resources of the nation and promote national prosperity and an efficient, dynamic and self reliant economy,"⁴⁸ as well as "control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity."⁴⁹ They, therefore, have the corresponding duty to the public to account for how the machinery of government is being run.

The Abuse of the Immunity Clause

The issue of executive immunity has been the subject of litigation in quite a number of cases. In *Obih v. Mbakwe*,⁵⁰ the Supreme Court stated that the reason for the inclusion of the Immunity Clause into the 1979 Constitution was to prevent the Governor from being inhibited in the performance of his executive functions by fear of civil or criminal litigation during his tenure as Governor.⁵¹

47. See sections 143 and 188 of the 1999 Constitution. See also *This Day of October 17, 2006* where the speaker of the Ekiti State House of Assembly said shortly after an impeachment notice was served on the Governor, that impeachment had become paramount if members of the House would escape being stoned on the streets by the people of the State.

48. See section 16 (1)(a) of the 1999 Constitution.

49. Section 16 (1) (b), *ibid.*

50. (1984) 1 SCNLR 192 at 211.

51. See also *Alamieyeseigha v. Yeiwa* (2002) 7 NWLR (Part 767), p.581 where the Court of Appeal restated the intentment of section 308 of the 1999 Constitution following the Supreme Court position in *Obi v. Mbakwe* (*supra*).

The rationale for the immunity from suit, arrest or imprisonment and from court processes requiring or compelling the appearance of persons covered by the Immunity Clause is to give the office they hold, the dignity, esteem and respect that go along with it. In the words of Ben Nwabueze:

“The special protection afforded by the immunity is for the office, not for its individual holder as such. It is the majesty and dignity of the nation as symbolized by its Head that is at stake. To drag an incumbent president to court and expose him to the process of examination and cross-examination cannot but degrade the office.”⁵²

While not denying that the Immunity Clause may be a “necessary evil”⁵³ in a democracy since the beneficiaries of immunity are vested with significant powers that directly or indirectly affect the collective well being of the citizens, the debate on the abuse of the Immunity Clause has become heated in recent years. The rationale of the continued relevance of the Immunity Clause has been questioned and countered with the accountability of the beneficiaries.⁵⁴

This is mainly due to the high level of corrupt practices being accredited to many State Governors who hide under the Immunity Clause to escape being tried. In recent years, a good number of State Governors have come under the searchlight for the abuse of the Immunity Clause. The general malaise of corruption, money laundering, illegal diversion of public funds,

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52. Ben Nwabueze: *Constitutional Democracy in Africa* (Volume 1), Spectrum Books Limited, Abuja, Benin City, Lagos, Owerri, 2003, p. 340, see also John Ademola Yakubu: *op.cit.*, p. 247.
 53. “Immunity Clause is a necessary evil, says Nwabueze” in *Daily Independent*, January 14, 2005, p.A6.
 54. See generally, Deji Adekunle: The Constitutional Immunity of Elected Officials in *The Uwais Court: The Supreme Court and the Challenge of Legal Development (1995 - 2006)*, Nigerian Institute of Advanced Legal Studies, Lagos, 2006, p.123.

receipt of illegal goods among others has eaten deep into the fabric of many State Governments, one of the more recent of which led to the "Impeachment saga" that played out in Ekiti State. The Governor, Ayo Fayose was accused of several offences including the illegal diversion of N11.7 billion local councils' funds and 1.3 billion Ekiti Integrated Poultry Project funds, the receipt of 37,000 Pounds in illegal gifts as well as possession of property running into millions of Naira.⁵⁵ Before the crisis in Ekiti, other State Governors had come under the searchlight for similar acts. Governor Dariye of Plateau State was under probe for allegedly fiddling with N1.6 billion ecological fund belonging to the State⁵⁶ while former Governor Alamieyeseigha of Bayelsa State was impeached by the State House of Assembly and is now facing several charges of money laundering.

With the problem of the high indices of corruption in Nigeria, it has been argued that the Immunity Clause will only act as a protective shield, making it difficult to curb the problem of corruption in the country.⁵⁷

Call for the Removal of the Immunity Clause

The call to expunge section 308 of the 1999 Constitution which provides immunity from legal proceedings for the President, Vice-President, Governors and Deputy-Governors was on the front burner of the National Assembly Joint Committee on the botched review of the 1999 Constitution. The idea was to remove the part of the section giving the persons mentioned immunity

55. See *Thisday* Newspaper of October 17, 2006, p.18.

56. See report of *The News Magazine* of 16 October 2006, p.50. He was consequently impeached.

57. Nuhu Ribadu: "Obstacles to Effective Prosecution of Corrupt Practices and Financial Crime Cases in Nigeria," in Oladele Balogun: *African Leaders and Constitutional Immunity: The Moral Question* available at <http://www.gsu.edu/wwwphl/ethics/africaconference/papers/Balogun.pdf>. visited on 10.10.06.

from criminal proceedings while retaining immunity on civil matters.⁵⁸

In Nigeria's nascent democracy where the fight against corruption is only beginning to gain grounds, it is argued that the quality and minds of many who seek and obtain political power is dismally suspect and abysmally poor. Commenting on Executive Corruption during Nigeria's second republic under the 1979 Constitution, it was observed that by 1979, Nigeria was earning oil revenue at the rate of 29 billion dollars a year. Much of that windfall was however looted by the ruling elite at the rate of 25 million naira a day.⁵⁹ Corroborating this, a member of the United States House of Representatives stated that "Nigeria's national treasury is systematically looted by government officials. Roughly 3,000 officials now have Swiss Bank Accounts totaling 33 billion dollars."⁶⁰ More recently, it was reported in the media that an international report indicated that looted funds kept in foreign accounts by Nigerian public officials had risen from 50 billion dollars to 100 billion dollars in the last six years.⁶¹ Although it may be the case that this figure is exaggerated, there is no doubt that there has been an exponential rise in massive transfer of looted state funds abroad since 2000.

Experience over the years has shown that executive office holders in Nigeria at the state and federal levels of Government have employed the protective shield provided by the Immunity Clause to commit fraud, loot the treasury, subvert the principle

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58. See *This Day* March 11, 2006, front page. See also the report of the National Constitutional Conference Committee on Civil Society, Labour, Trade Unions and National Media, Vol.1 Chapter 18 paragraph 1.18.2 (xxii) as quoted in Deji Adekunle, *op.cit.* p.138, Recommendations of the Committee on Judicial and Legal Reforms of the National Political Reforms Conference held in May 2005; Chidi Anselm Odinkalu: *Legal Reforms on the Confab Agenda, Open Justice Initiative* at http://www.justiceinitiative.org/db/resource2?res_id=102742. visited on 01.11.2006.
59. George Ayitteh: "The Real Foreign Debt Problem," *The Wall Street Journal*, April 8, 1984, p.30.
60. Robert Dornan: *Tell Magazine*, October 18, 1993, p.10.
61. Dayo Aiyetan: *Tell Magazine*, October 17, 2005, p. 27.

of public accountability and engage in sundry acts which undermine the integrity of their office and the interest of the people they govern. The net result of non-accountability and executive profligacy in the management of public funds is the monumental corruption in the land, which "has rendered Nigeria morally bankrupt, stifled development, made nonsense of the rule of law and made democracy impossible."⁶²

The question of sensitivity in governance or moral integrity, such that would warrant voluntary or induced surrender of power when the character of the holder of high office is in criminal dispute is practically non-existent.⁶³

These factors, among others have given rise to the call for the removal of the Immunity Clause from the Constitution. This is being made despite the fact that the immunity is only for the period of time during which the person holding such office is required to perform the functions of the office. In other words, the prosecution for corrupt practices and other offences leveled against persons covered by the Immunity Clause is not barred but only postponed to such a time when the person concerned ceases to hold the office.⁶⁴ This principle was again restated by the court in *Abacha v. F.R.N*⁶⁵ where the issue of the scope of the Immunity Clause was raised. Here, the appellant's father, the late General Sani Abacha, was head of State between 1993 and 1998. He transferred various sums of money from the coffers of the Federal Government and the Central Bank of Nigeria under the guise of national security and other urgent national matters, to foreign bank accounts. On the issue of the scope of immunity, the Court of Appeal stated as follows:

62. Sonny Akpose: *The Guardian*, December 10, 1993.

63. Dayo Alalade: Executive Constitutional Immunity is an Absurdity that Merits Immediate Removal available at <http://nigeriaworld.com/articles/2005/nov/304.html> visited on 10/10/2006.

64. See *Tinubu v. IMB Securitie*, *supra*.

65. (2006) 4 NWLR Part 970 at p.239.

“Under our law the question of immunity covers the period the office holder is in office and not when his term of office has expired.”⁶⁶

This ‘lapse’ of immunity with the end of tenure of beneficiaries was also the case following the impeachment of the former Governor of Bayelsa State who is currently facing corruption charges.

A Comparative Analysis

While Executive immunity clauses are not uncommon in a democracy, many countries are wary of including a blanket immunity clause as is the case under the Nigerian Constitution. The Constitution of the United States of America for example confers no immunity on the President such as corresponds with that under section 308 of the 1999 Constitution. In the United States, all officers are subordinate to the law and must obey its mandate.⁶⁷ Even though the American Constitution does not provide for Executive Immunity, case law has developed so far that immunity is granted based on notions of public policy and convenience.

In the case of *Nixon v. Fitzgerald*,⁶⁸ the Supreme Court provided the President with the protection of absolute immunity. The case involved the plaintiff who lost his job as an employee of the Department of the Air Force. He sued various government

66. Per Adeleke J.C.A at p.311, *ibid*. This rule was followed by the United States of America recently when Governor Ernie Fletcher of Kentucky was indicted on charges alleging his administration rewarded political supporters with protected state jobs after he took office in 2003. The Court ruled in August 2006 that Fletcher is protected by executive immunity and cannot be prosecuted while in office. The motion to dismiss was however denied. The criminal trial will be delayed until he is either impeached or out of office. This affirms the principle that no one is above the law. See “Breaking News: Fletcher Can’t be Tried while in Office”, *The Daily Independent Online* at http://www.dailyindependent.com/statenews/local_story_223141128.html. visited on 27.10.2006.

67. See generally, Ben Nwabueze: *op. cit.*, p. 342 and 343.

68. (1982) 457 U.S. 731.

officials, including former President Richard Nixon. The Court considered at length the Constitution, legislative history, case law, the separation of powers doctrine as well as public policy. Based on its findings, it held that the President should enjoy the protection of absolute immunity from civil suits.⁶⁹ This was so as not to impair the President's capacity to perform his duties. Justice Powell in the *Fitzgerald's* case stated as follows:

“The President faces issues and makes decisions on matters that re far-reaching, very sensitive, and likely to arouse the most intense feelings. It is in the public interest for the President to have the opportunity to make these decisions efficiently, skillfully, and without fear of civil liability”⁷⁰

As pertains to criminal suits, American Presidents do not enjoy absolute immunity. In *Nixon v. Administrator of General Services*⁷¹, a balancing test was set forth. Under the test, before a court may exercise jurisdiction over the President, it must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the President and the executive branch. When using this balancing analysis in a criminal prosecution, the balance would weigh in favour of permitting prosecution.

Even though the Supreme Court in the *Fitzgerald* case held that the president had absolute immunity from liability in civil suits, it emphasized that the ruling would not put such Executives above the law as there was not only the option of impeachment but also the constant and unwavering scrutiny by the media. This “constant and unwavering scrutiny by the media” though quite

69. See also, *Jones v. Clinton* 520 U.S. 681 (1997); Amy Marshall: *Jones v. Clinton: Reconsidering Presidential Immunity* available at law.richmond.edu/rjolpi/issues_Archived/1996_FallAmerican_Presidency/MARS_HALL-htm. visited on 27.10.2006.

70. Judgment at p.752.

71. 1977 433 U.S. 425 .

visible in Nigeria's present democracy, is unlikely to shame a person enjoying immunity in Nigeria into resigning voluntarily when found wanting. According to the Head of Nigeria's Economic and Financial Crime Commission, thirty-three out of the thirty-six State Governors are under investigation for alleged corrupt practices. They run their States like personal fiefs. They do not feel obliged to be responsive to the voters since most of their allocation comes from the federal government.⁷²

Again, in the Philippines, the Constitution does not provide for presidential immunity from suit. Basis for the immunity is only found in jurisprudence which by virtue of their Civil Code forms a part of the legal system.⁷³ The purpose of the immunity was discussed in the case of *Soliven et al v. Judge Makasiar*⁷⁴ where the Supreme Court of the Philippines stated that:

“The rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all the office-holder's time, also demands undivided attention.”⁷⁵

It is interesting to note that unlike the Courts in Nigeria have ruled, in the *Soliven* case mentioned above, the Court held that nothing prevented the President from waiving the privilege of

72. “Capping the Well-heads of Corruption” in *This Day*, 21/10/2006.

73. Article 8, The Civil Code of the Philippines, Republic Act No. 386 of June 18 1949, available at <http://www.chanrobles.com/civilcodeofthephilippines.htm> visited on 01.11.2006.

74. (1988) 167 SCRA 393.

75. See also the case of re: *Saturinino v. Bermudez* (1986) where the same Supreme Court expressly held that “Incumbent presidents are immune from suit or from being brought to court during the period of their incumbency and tenure”. See text at http://www.lawphil.net/judjuris/juri1986/oct1986/gr_76180_1986.html visited on 01.11.2006.

immunity. Thus, if so minded the President may shed the protection afforded by the privilege and submit to the court's jurisdiction. In contrast, section 308 of the 1999 Constitution prescribes an absolute prohibition on the court from entertaining any proceedings, civil or criminal, against a person to whom that section applies during his period of office. There is therefore no question of waiver of the immunity by the persons protected by the Immunity Clause. This was restated in the case of *Tinubu v. I.M.B Securities*.⁷⁶

In several other countries including countries in Africa, Executive Immunity is limited to the office of the President. The section on Immunity in the Constitution of Uganda states thus:

“The President is not liable to proceedings as long as he is in the office. However, civil or criminal proceedings may be instituted against him the moment he ceases to be the president, in respect of anything done or omitted to be done in his or her personal capacity before or during his term of office.”⁷⁷

In countries that operate the Constitutional Court, this has been used thwart the use of the Immunity Clause as an escapist route for corrupt officials. In Italy for example, Mr. Silvio Berlusconi was sworn in as Prime Minister for a second term in June 2001. There followed accusations of corruption which led to civil unrest and political differences with his allies. A trial was commenced but halted when the Italian Parliament largely controlled by Berlusconi's party members approved a contentious legislation giving serving Prime Ministers immunity from prosecution. The Constitutional Court however stepped in and the Immunity Legislation was thrown out. Berlusconi therefore became the first serving Prime Minister in Italian history to

76. *Supra*. Per Karibi-Whyte J.S.C at p.679.

77. See section 98 (4) of the Ugandan Constitution of 1995.

appear and be convicted in court on charges of corrupt enrichment and embezzlement.⁷⁸ In Nigeria, even though the idea of having a Constitutional Court was proposed in the interim 1995 Constitution⁷⁹, it has been argued that it may create more problems than provide solutions particularly in the areas of access to justice and jurisdictional conflict. The cost implication has also been an area of concern especially as the establishment of such a court in a Commonwealth country is an aberration.⁸⁰ The creation of such Courts both at the federal and state levels came up again as a recommendation of the Committee on Judicial and Legal Reforms of the National Political Reform Conference.⁸¹ It is however doubtful that the introduction of such courts will make a significant impact on the issue of public accountability *vis-a viz* the immunity clause.

A Critical Analysis

In arriving at a conclusion as to whether or not to support the retention of the Immunity Clause in the Constitution, the logical approach will be to weigh the reason for the Clause against the harm being suffered by the existence thereof.

The provision of the Constitution on immunity from suit for public officials named therein, is a policy legislation designed to confer immunity from civil suit or criminal process and to insulate them from harassment on their personal matters incurred before their election.⁸² Governance is a serious matter. Those that are privileged to hold positions of governance, like those who enjoy immunity are vested with significant powers that directly and indirectly affect the collective well being of the

78. See Oladele Abiodun Balogun: *op.cit.* p. 15.

79. See Africa Policy E-Journal at <http://www.africaaction.org/docs98/nig9812.htm>. See also Nigeria Index at http://www.oefre.unibe.ch/law/id/ni_index.html visited on 01.11.2006.

80. These concerns were raised by the Chief Justice of Nigeria as reported by Chidi Anselm Odinkalu in Legal Reforms on the Confab Agenda, *op.cit.*

81. See Chidi Anselm Odinkalu, *ibid.*

82. Per Karibi-Whyte J.S.C in *Tinubu v. I.M.B. Securities supra.*, p.675.

citizens. It is therefore in the interest of the nation that persons holding such offices can function without undue hindrances.

With Nigeria's nascent democracy, the removal of the Immunity Clause may produce a situation where the system is manipulated to harass and intimidate these office holders with criminal and civil processes, thereby exposing them to unnecessary distractions in the course of their tenure. Based on the recognition of these possible abuses, the Immunity Clause is provided for in the Constitution to protect this category of public officers against wanton arrests and law suits.⁸³

Immunity however is not to be equated to impunity.⁸⁴ There is no interpretation of the Immunity Clause that permits this category of public office holders to commit crimes and go free. Immunity is only for the duration of the office. As soon as the officer enjoying immunity leaves office, he becomes answerable for any criminal and civil action. The Constitution offers neither a time bar nor an expiry date for such prosecution. Even in civil cases where time may act as a bar to the institutions of certain actions, time only begins to run when the action has accrued, that is, when the public officer leaves office and becomes liable.

It is not in doubt that the chances are that a corrupt official, knowing the likely consequences of his corrupt practices after he leaves office, would do his utmost to hide traces of monies or properties illegally accrued or seek refuge in another country. The war on endemic corruption has however only now began to take shape and with Nigeria's history of frequent military intervention, it might be a bit too soon to draw the conclusion that very few corrupt officials have been brought to book after their tenure.

The military took over power from the Shehu Shagari led democratic regime after the botched presidential elections in 1983 and remained in office until 1999. It has been the view of

83. See generally, Edo Ukpong: "Stupid Immunity Syndrome" in *This Day*, April 5, 2005, p.59.

84. See Deji Adekunle: *op. cit.* p. 137.

many that this era brought along with it an unprecedented degree of economic mismanagement. The reckless and destructive level of corruption and the total disregard for the rule of law rendered rationality in the conduct of public affairs impossible. Referring to a transition programme initiated by former military Head of State, General Ibrahim Babangida, a conclusion was reached thus:

“The military’s political transition in Nigeria must be judged a sweeping and unambiguous failure. It failed to return the country to civilian rule (much less to democracy). It failed to bring forth a new political structure. It failed to control corruption and improve accountability.”⁸⁵

With the transition to, and hopefully sustainable democratic system, there is renewed hope that things will get better in Nigeria. The efforts still being made to recover illegal money looted from the government treasury by the former military Head of State Sani Abacha from members of his family despite his demise is encouraging.⁸⁶ Even seeking cover from prosecution in foreign countries may no longer be a very attractive option against the backdrop of the ever increasing globalization of justice. Regarding the change in attitudes of western countries in welcoming “dirty money” into their economies while offering a roof for perpetrators of money laundering, it is a fact that the volume of illicit money being channeled to finance terrorism has accounted for the far-reaching changes in the laws of western countries relating to the transfer and banking of funds and the criminalization of the concealment of such illegal money.⁸⁷ The

85. Larry Diamond, A. Kirk-Green and Oyeleye Oyediran, eds: *Transition Without End - Nigerian Political and Civil Society Under Babangida*, Vantage Publishers, Ibadan, 1996, p.xvii.

86. See *Abacha v. F.R.N. supra*

87. See Deji Adekunle: *op. cit.* p.136.

recent focus on corrupt Nigerian officials has raised the sensitivity to illegal financial transactions in many countries.

Even during the tenure of persons who enjoy immunity, citizens have the opportunity, through their elected representatives⁸⁸ to impeach such persons for a breach of the provisions of the Constitution, or for misconduct of such nature that amounts, in the opinion of the National Assembly or State Assembly, as the case may be, to gross misconduct.⁸⁹ The provision for the removal of these category of public holders is certainly a device to prevent the Immunity Clause from becoming a total shield to holders of these offices who have, in the opinion of the citizens through their representatives, conducted themselves unacceptably and are therefore not worthy of the protection afforded by the Immunity Clause.⁹⁰

The immunity from prosecution and civil action granted under section 308 of the Constitution is tempered by the provisions in the same Constitution demanding accountability from public officers. The Constitution contains far reaching provisions meant to ensure public accountability and to check fraud and financial excesses by members of the executive.

Recognizing the sweeping powers given to the President and Governors by the Constitution to control and disburse public funds, the Constitution provides that such disbursement of public funds can only be made in accordance with the Appropriation Bill, duly passed by the Legislature.⁹¹

88. That is, the House of Representatives or the State Houses of Assembly as the case may be.

89. Section 188 (11) of the 1999 Constitution.

90. The impeachment clause has been described as "a major weapon of check-and-balance in the Nigerian 1999 Constitution to check the abuse of enormous executive powers exercised and ex of check-and-balance in the Nigerian 1999 Constitution to check the abuse of enormous executive powers exercised and exercisable by elected functionaries of the executive arm of government". See Ajayi Olatunji: *The Gale of Impeachment and Constitutional Intricacies* at nigeriaworld.com/articles/2006/oct/098.html. visited on 02.11.2006.

91. Sections 81 and 122 of the 1999 Constitution.

Beyond that, the Attorney-General of the Federation and the States are directed to audit the public accounts of the Federation and of the States and submit same to the National Assembly and State Houses of Assembly.⁹²

The Legislature at the federal and state levels of government are also empowered by the Constitution to carry out oversight activities on the conduct of the affairs of public officers and government departments charged with the disbursement of funds.⁹³

The aforementioned provisions of the Constitution provide that the purpose of the investigative power given to the Legislature is to, among others, expose corruption, inefficiency or waste in the disbursement or administration of funds appropriated by it.⁹⁴ They have been described as “a watchdog of public funds”.⁹⁵ Even though this section does not constitute the Legislature into a universal “Ombudsman” inviting and scrutinizing the conduct of every member of the public for the purposes of exposing corruption, they can, as the Court of Appeal stated in a general guide on the issue in the case of *Senate of the National Assembly & Ors v. Momoh*,⁹⁶ invite government functionaries when they want to gather facts for the purpose of enabling them make laws or amend existing laws in respect of any matter within their legislative competence or as witness in a properly constituted enquiry. In the United States case of *Watkins v. United States*,⁹⁷ the Supreme Court, while

92. Sections 5 and 125, *ibid.* see also D.A Guobadia: “The Legislature and Good Governance under the 1999 Constitution” in Ayua *et al eds: Issues in the 1999 Constitution*, 2000, Nigerian Institute of Advanced Legal Studies, Lagos, p. 47 and 52

93. Sections 88 and 128, *ibid.*

94. Sections 88 (2) (b), 128(2)(b).

95. Ameze Guobadia: “The Legislature as a Watchdog of Public Funds” in I.A. Umezulike ed. *Towards the Stability of the Third Republic*, 1993, Fourth Dimension Publishers for the Federal Ministry of Justice, p.73.

96. (1982) 2 F.N.L.R. 307.

97. 354 U.S. 178, 187 (1957).

construing a similar provision on the powers of the Legislature to carry out its oversight functions stated that:

“It compasses inquires concerning laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”

In another case, *McGrain v. Daugherty*,⁹⁸ the U.S. Supreme Court stated that to compel attendance to give information resolution of Congress must not expressly state that the investigation was in aid of legislation as long as it falls within the jurisdiction of Congress.⁹⁹

While agreeing that the investigative powers of the Legislature has its limitations¹⁰⁰, being among other things, subject to the provisions of the Constitution¹⁰¹ (and therefore to the Immunity Clause) and also taking into account the doctrine of separation of powers, it is the duty of the Legislature to consider and pass some or all proposals in an Appropriation Bill.¹⁰² In doing so, they are expected to protect the interests of their constituencies with the sole motive of doing what is best for the State or country.¹⁰³

98. 273 U.S. 135 (1927).

99. See also Sebastine Tar. Hon: *Constitutional Law and Jurisprudence in Nigeria*, Pearl Publishers, Port-Harcourt, 2004, p.169.

100. See Abiola Ojo: *The Investigatory Powers of the National Assembly under the 1989 Constitution: Sections 86 and 87 Considered in Democracy Beyond the Third Republic*, Fourth Dimension Publishers, Enugu, 1993, p.107.

101. Section 88 (1)

102. See Uche Omo: *Separation of Powers: Managing the Legislative, Judicial and Executive Relationships in a Democratic Polity in Democracy Beyond the Third Republic*, op.cit, p.7.

103. *Ibid.*

In the wake of the massive official corruption Nigeria has witnessed in the past seven years and also considering the interdependency of one arm of government on the other, it is unfortunate that the legislature has failed to exercise their investigative powers of ensuring that public funds are disbursed in accordance with the Appropriation Bill and in the interest of the people they represent. They have rather employed their power of appropriation and investigative (oversight) powers not as a tool to advance good governance, but rather as a weapon to extort from the executive, their own share of the national loot.¹⁰⁴

The Oath of Allegiance which must be sworn to by persons protected by the Immunity Clause before taking office is also provided by the Constitution to act as an incentive for occupants of such sensitive offices to perform their duties so as to "preserve, protect and defend the Constitution."¹⁰⁵ Such executive officers affirm in the Seventh Schedule of the Constitution to abide by the Code of Conduct as contained in the Fifth Schedule to the Constitution. The Code of Conduct prohibits several acts of misconduct by public officers. These include the prohibition of foreign accounts, receipt of gratification in carrying out his duties, bribery, abuse of power and so on.¹⁰⁶

The Constitution does not provide any exception from liability for executive immunity holders from the Code of Conduct Tribunal as provided for by the Constitution.¹⁰⁷ For the purposes of the Code of Conduct, public officers include the President, Vice-President, Governors and Deputy-Governors.¹⁰⁸ It therefore follows that despite the fact that prosecution under the Code of Conduct Tribunal takes the form of a criminal trial, it cannot be put on the same footing as a criminal trial.

104. See Bolaji Owasanoye: *op.cit.* p. 235 at 241.

105. See the Seventh Schedule of the 1999 Constitution.

106. Sections 1 to 10 of the Fifth Schedule, *ibid.*

107. Section 15 of the Fifth Schedule. *ibid.*

108. Part II *ibid.*

The Constitution, going by the above clearly provides for checks against abuse by members of the executive, among others. However, the body in charge of investigating cases of abuse has not stood up to its responsibilities. This could be for a number of reasons ranging from the lack of funds, their independence on the Executive or on the fact that the Attorney-General – himself an appointee of the President is given the prerogative to institute proceedings.¹⁰⁹

Recommendations

This chapter holds the view that despite the arguments put forward for the removal of the Immunity Clause from the Constitution, it will not be in the best interest of the nation to do so. This is in order to check unnecessary litigation against executive office holders and protect them from undue distraction from running the affairs of the nation and the states.

Even if the Immunity Clause is expunged from the Constitution, it is doubtful if proper and effective investigation could be carried out against an incumbent President, Vice-President, Governor or Deputy-Governor and a fair and just trial conducted against such an officer. This is because even without the protection of immunity, such an officer will most probably use the weight and influence of his office to interfere with and frustrate investigations against him. In the same way, he will also influence the course and outcome of his trial in Court.

The Constitution has adequately empowered the legislature to impeach members of the executive who have committed gross misconduct which include corruption and fraud. Removing the coat of immunity from the office of the Vice-President, Governors and Deputy-Governors while leaving that of the President as has been suggested, does not change much in terms of the reasons canvassed for the removal of the Immunity Clause.

109. Cap. 56 LFN 1990.

Against this backdrop, it is our recommendation that while retaining the Immunity Clause for the office of the President, Vice-President, Governors and Deputy-Governors, legal guarantees for open government should be put in place. Through access to public records for example, the tendency to divert public funds to private use will decline, especially in a democratic setting where such office-holders usually strive for either second terms or other offices in the future. Following the recent passing of the Freedom of Information Bill¹¹⁰ into Law, the right of access to public information will be ensured. This will promote the accountability of public officers.

It is also our recommendation that a substantive Minister for Petroleum/Solid Mineral Resources be appointed by the President upon prior recommendation and subsequent approval of the National Assembly. Considering that the bulk of the nation's foreign exchange earnings come from the petroleum sector, it ought not to be in the absolute control of the office of the President who enjoys immunity from suit. Ministers can be more easily checked for corrupt practices and removed. They also do not fall under the category of officers protected by the Immunity Clause and can therefore be more easily prosecuted for corrupt practices.

Again, to insure against absolute control, it is imperative that the Constitution be amended to grant local governments financial and administrative autonomy from the States.¹¹¹ The Constitution by virtue of section 7(1) provides that the system of local government by democratically elected local government councils is guaranteed and accordingly, the government of every state

110. A Bill for an Act to make public records and information more freely available, provide for public access to public records and information, project public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorisation and establish procedures for the achievement of those purposes and related purposes, 2006.

111. Section 7(1) and 162(1) of the 1999 Constitution.

shall ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.¹¹² By virtue of section 162 (5), the National Assembly is constitutionally empowered to prescribe the terms and manner governing the disbursement of the funds due to the local governments and paid to the States for the benefit of their local government councils.¹¹³

The Nigerian example has shown that many state governors divert the allocations for the local government councils to other uses. This, among other things has led to the impeachment process being entered against such governors. Where the local government councils get their financial allocations directly from the federation account, there will be more scrutiny as to the use or misuse of public funds. This is because local government chairmen who will then be in direct control cannot hide under the umbrella of immunity. Also, the councilors who work closely with the chairmen and who are elected from the various wards under the local government councils will act as watchdogs for funds to their wards. Such officials can also be much easier removed than the governors.

Reckless spending, mismanagement, embezzlement and the lack of accountability puts the economy under strain. With a fiscal responsibility legislation entrenched in Nigeria, transparency will be enforced. The passing of the Fiscal Responsibility Bill which has passed its second reading before the National Assembly will help to ensure fiscal prudence and mutually supportive coordination among all tiers of government.

With all these checks in place, the problem of the lack of public accountability will reduce. This, in our view will yield better results than expunging the Immunity Clause as this does not necessarily solve the problem of the abuse of office.

112. See also *A.G. Abia v. A.G. Federation* (2002) 6 NWLR, Part 763, p. 265 at 319, Per Kalgo, J.S.C.

113. See also *A.G. Lagos State v. A.G. Federation* (2004) 18 NWLR Part 904 n 1 at 35, Per Akintan J.S.C

Conclusion

The removal of the Immunity Clause from the Constitution will not solve the problem of abuse of office and the lack of public accountability by executive office holders. The provision on immunity was inserted into the constitution after serious thought and consideration was given to it and the removal should take long term interests and expectations into account. Considering the nature of the Nigerian society and current state of development, it is more convincing that the retention of section 308 conforms more to maximize the fulfillment of the interests of the community and promote the smooth running of the machinery of society than its removal.

The proper implementations of the provisions already stated in the Constitution to check the misuse of public funds, taken together with the recommendations put forward by this chapter will go a long way to ensure that members of the executive protected by the Immunity Clause remain accountable to the citizens.

THE POLITICS OF IMPEACHMENT: THE NIGERIAN EXPERIENCE

by

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“WE have learned in the past few months the perils of democracy in the evolving drama of our nation. Nothing demonstrates this more than the spate of impeachments of state executives. And a cardinal casualty is legitimacy. Where legitimacy is questionable, democracy cannot thrive.”¹

“A drift to anarchy has long been suspected within the polity. But it does appear that Nigeria is now in for a full blown democratic dictatorship. The tacit approval of and support for illegality being perpetrated in some states of the federation suggest that there may be a hidden agenda yet unknown to Nigerians. The impeachment of Governor Ayo Fayose of Ekiti State is a clear case of dreaded descent to anarchy.”²

Introduction

The gale of impeachments that recently hit the polity has swept five State Governors – those of Bayelsa, Oyo, Ekiti, Anambra and Plateau – out of office. While the details of these impeachments might vary, the manner of their execution tends to fit into a pattern, one in which allegations of wanton disregard

1. The *Nation* Editorial, November 15, 2006 at p.1.
2. The *Nigerian Tribune* Editorial, October 17, 2006 p. 1

for due process are a clear feature. This is what a national daily,³ in a front page analysis has aptly portrayed as “Unconstitutionality as Normality”. The analysis under reference came up a day after the Governor of Plateau State, Joshua Chibi Dariye was ‘impeached’ by a “six-man” House of Assembly.

The Guardian newspaper captured the details of this impeachment as follows:

The six law-makers had arrived in Jos, the capital of Plateau State at about 4:00am amidst tight security and proceeded to the chamber of the State House of Assembly complex where they sat for about 40 minutes to deliberate on the interim report of the investigative panel probing the governor over alleged abuse of office and other financial offences. The Chairman of the Panel, Chief John Mark Samci, a source said, was called upon late Sunday night to prepare his report based on the document in his possession and be ready to submit it to the six member House of Assembly.

At the Chamber of the House where the impeachment process was conducted, only the six law makers, the clerk of the House, Mr. Cornelius Shibolal, who has been in the EFCC custody, two members of the Investigative Panel and Security operatives were present, it was gathered.

According to a source close to the Panel, the lawmakers and other external forces moving for the impeachment did not wait for the full report of the Panel because of the fear that four members of the Panel were planning to opt out and that the

3. *Daily Independent* of Tuesday November 14, 2006.

Court of Appeal might also grant an injunction against the sitting of the Panel.

Immediately the House of Assembly members finished their sitting, they were driven back to Abuja under security escort, while another crop of security men were deployed in Ray Field Government House and other strategic parts of the towns.⁴

In the *Daily Independent* analysis referred to earlier, the point was made that "Not even during the military dictatorial regimes did Nigeria witness brazen acts of illegality, so perpetrated with impunity as they are in the present democratic dispensation". The paper, in its Editorial⁵ on the imposition of a state of emergency in Ekiti State, captioned "Constitutionalism in Reverse: The Looming Anarchy" (page B4) has noted that "with the way legislators have conducted themselves in Bayelsa, Oyo and Ekiti and are going about their business in Plateau and Anambra we fear for the life of this country. Politicians are bent on side tracking the constitutional formula for political succession and transfer of power. We see a trend whereby political parties that are supposed to inject and canvass enduring democratic norms into the polity are using 'self-help' methods to hijack incumbency and position themselves favourably at the next polls. What is happening and the tactics of the legislators in Plateau and Anambra are more than political gerry mandering but a calculated attempt to subvert the sovereignty of the people of Nigeria."

No doubt, the "constitutional altercation" (apology to *The Sunday Vanguard* of October 22, 2006 p. 10) arising from the gale of impeachments blowing across some states of the federation has created credibility crisis for democracy and its current operators in the country. It has placed the country

4. Tuesday November 14, 2006 p. 1.

5. Monday, October 23, 2006.

stipulated by the Constitution, having the important duty of making laws.¹⁰

Judicial Immunity derived from the common law rule gives Judges immunity from civil liability in respect of acts done or anything said by them in the course of their judicial functions. This has been codified in the various Court Laws of the States.¹¹

Executive immunity which is the main trust of this chapter is however much broader than the two types above and is discussed below in more detail.

Constitutional Provisions on Executive Immunity

The Constitution¹² gives the President, the Vice-President, the State Governor and the Deputy-Governor only,¹³ complete immunity from all court processes as long as they hold such offices. Section 308 (hereinafter referred to as the Immunity Clause) which contains the provision on immunity states as follows:

- (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:
 - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
 - (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
 - (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings

10. See section 4(1) and 4(6) of the 1999 Constitution.

11. See also *Egbe v. Adefarasin & Anor* (1985) 16 NSCC, part 1, p.643.

12. Section 308, 1999 Constitution.

13. It does not confer this immunity on members of the other two arms of government such as the President of the Senate or the Chief Justice of Nigeria.

- against a person to whom this section applies, no account shall be taken of his period of office.
- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
 - (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy-Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

The above provisions may be summarized therefore to mean that during the tenure of office the President, Vice-President, Governor and Deputy-Governor, no civil or criminal proceeding may be instituted or continued against them and they may not be arrested or imprisoned. Also, no court process requiring or compelling their appearance in court may be applied for. Courts are prohibited from issuing any such process. Any application of other provisions of the Constitution which may work against the immunity of such officials are suspended in relation to their actions during the period of their immunity.¹⁴

In the case of *Ejura v. Idris*,¹⁵ the question arose as to whether the constitutional immunity under section 308 of the Constitution applies to election petition matters. In that case, the Governor of Kogi State was stated by the appellant to have supplied false information on his Independent National Electoral Commission (INEC) Form. The suit was therefore brought that an injunction be pronounced restraining him from further parading himself as the Governor of Kogi State. The issue

14. An example is the Chapter IV on Fundamental Human Rights. See also Oluwadare Aguda, *op.cit.*, p.179.

15. (2006) 4 NWLR, Part 971 at p. 538.

therefore arose as to whether the High Court had the jurisdiction to entertain the case, having regard to the provisions of section 308 of the Constitution.

In providing an answer to the question as to whether or not the Immunity Clause under section 308 of the Constitution applies to election petition matters, the Court of Appeal stated as follows:

“Where the election of the President, Vice-President, Governor or Deputy-Governor are questioned in an election tribunal, the provisions of section 308 of the Constitution no longer applies. But the provisions of section 21(5) of the Electoral Act, 2002 can only operate to remove an elected Governor if the said provisions are invoked before an election tribunal. In this case, the 1st respondent, the Governor of Kogi State can only be removed by a successful petition heard by an Election Petition Tribunal. Since, the appellant sought to remove the Governor by an originating summons filed before the Federal High Court, the provision of section 308 of the Constitution protects the Governor from such a civil proceeding, notwithstanding the provision of section 21(5) of the Electoral Act, 2002. The trial court was therefore right to decline jurisdiction in the light of the clear provisions of section 308 of the Constitution.”¹⁶

The Constitution however is specific about the fact that the immunity is granted only in the personal capacity of such office holders and not in their official capacities or to civil or criminal proceedings in which such a person is only a nominal party.¹⁷

16. *Ibid*, p.547.

17. Section 308(2)

Therefore, in the case of *Abacha v. Fawehinmi*,¹⁸ the applicant who was arrested and detained on the orders of the then Head of State filed an application at the Court. Among issues brought up in the cross-appeal was the question as to whether the 1st cross-respondent, as Head of State of Nigeria is immune from civil and criminal actions in all cases. Even though the question of the scope of immunity provided for protection of the President, Vice-President, Governor and Deputy-Governor only arose as *obiter* in this case, Justice Uwaifo JSC considered an observation made by the Court of Appeal as “a rather expensive *obiter*, quite capable of misleading the unwary and therefore deserves to be corrected at the first opportunity.”¹⁹ At the Court of Appeal, Pats-Acholonu JCA (as he was then) made a passing remark which did not form part of the decision and was therefore not a subject of appeal, as follows:

“When I look at this case, I observe that one of the respondents is the Head of State – General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution.”

Correcting the erroneous observation, the Supreme Court stated that the immunity provided by the constitution does not

18. (2000) 6 NWLR, Part 660 at p. 228.

19. See p.275, *Ibid*.

apply to the person in question in his official capacity or to a criminal or civil proceeding in which he is only a nominal party. In this case, the section of the Constitution referred to had been suspended by Decree No. 107 of 1993 and even if it were not suspended, its provisions would not apply since the Head of State was sued in his official capacity.²⁰

The Constitution also specifically provides that the right to start and continue proceedings against such members of the executive is not permanently abrogated but only suspended during their tenure in office.²¹ The Supreme Court in *Tinubu v. I.M.B. Securities*,²² was faced with the issue as to whether, having regard to the entire provisions of section 308 (1) (a) of the Constitution, proceedings in respect of civil action against the appellant who was (and still remains) the Governor of Lagos State in his personal and private capacity can be properly continued during his period of office as Governor. Relying on section 308, the Court of Appeal had adjourned the case *sine die* to be re-listed only when the appellant vacates the office of Governor of Lagos State. The Supreme Court, following the reasoning in the earlier case of *Colonel Olu Rotimi and Others v. Macgregor*²³ set aside this consequential order, substituting it with an order striking out the interlocutory appeal with the liberty to relist it after the appellant's tenure as Governor. He therefore cannot take account of his tenure to claim that the matter has become statute barred.

Investigation and Prosecution of Officers covered by the Immunity Clause

The issue as to whether or not persons who enjoy immunity from criminal and civil suits under the Constitution also enjoy immunity from investigation into an alleged crime by the police

20. See Lead Judgment *per* Ogundare J.S.C. at p.297.

21. See the proviso to section 308(1).

22. (2001) 16 NWLR Part 740 at p.670.

23. (1974) 11 S.C. 133. This case was decided based on section 161 (1) of the 1963 Constitution which contained the Immunity Clause in that Constitution.

has gained prominence in recent times in light of the investigations being faced by several members of the executive.²⁴

The Constitution under section 308 provides immunity from arrest and prosecution of persons protected under it. Such immunity is however not extended to the investigation of an alleged offence by such a person. There is no constitutional provision which grants immunity to the President, Vice-President, Governor or Deputy-Governor from investigation into an alleged offence.

The question as to whether or not persons named in section 308 (3) of the Constitution have immunity from investigation under the Immunity Clause came before the Supreme Court in the case of *Fawehinmi v. I.G.P.*²⁵ The main issues that arose in that case which involved alleged crimes committed by the governor of Lagos State, Governor Ahmed Tinubu against certain sections of the Criminal Code of Lagos State²⁶ were:

- Whether Governor Bola Tinubu in particular and persons named in section 308(3) of the Constitution have no immunity against investigation under section 308; and
- Whether the provision of section 4 of the Police Act²⁷ allows for the exercise of discretion by the Police on whether or not to investigate allegations of crime.²⁸

The Supreme Court in this case, found no support for the argument that police investigation is a part of criminal

24. Gani Fawehinmi (SAN) for instance examined the constitutional implications of the Economic and Financial Crimes Commission Report and the Administrative Panel of Inquiry Report into allegations of misconduct by serving Vice-President, Atiku Abubakar. See *Thisday* Law, *Thisday*, September 19, 2006, pp. 48 and 51.

25. (2002)7 NWLR, Part 767, at p.606.

26. Sections 191 and 192 of the Criminal Code, Cap. 32, Laws of Lagos State, 1994.

27. Cap. 359, Laws of the Federation of Nigeria, 1990.

28. See p. 610 of Report

proceedings as envisaged under section 308 (1) (a) of the Constitution. Even though the findings, results or conclusions of such an investigation could lead to criminal proceedings, criminal proceedings do not include police investigation as an act.²⁹ This flows from the fact that the investigation of a criminal complaint by the Police is a preliminary course which may or may not result in a criminal prosecution.³⁰

In the case of *Asakitikpi v. State*³¹ the Supreme Court unanimously held as follows:

“Trials in criminal cases commence with the arraignment of the accused person and arraignment in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon...”

The Constitution³² provides for the Police Act.³³ Under the Police Act, the Police are given the duty to prevent and detect crime, apprehend offenders, preserve law and order, protect life and property and enforce all laws and regulations with which they are directly charged.³⁴

It is generally accepted by the Courts that even though the Police have the public duty to take due measures for the purpose of enforcing the law, a substantial margin of discretion is conceded to them as to the appropriate method of enforcement

29. Per Uwaifo, J.S.C at p.680 of Report, *ibid.*

30. See *Asakitikpi v. State* (1993) 5 NWLR, Part 296, p.641.

31. *Ibid.* at p.645, see also *Oyediran v. Republic* (1967) NMLR Part 122, p.652.

32. See section 214(1).

33. Cap. 359, Laws of the Federation, 1990.

34. Section 4.

without risking judicial interpretation³⁵. The Court will therefore only interfere in obvious and exceptional circumstances.³⁶

The Police however clearly has a duty under the Police Act to investigate and preserve evidence of crime even if such evidence cannot immediately be used legally in a criminal investigation. They would therefore normally use their discretion well in such circumstances.

Even though investigation may not lead to the immediate arrest and prosecution of persons protected by the immunity clause,³⁷ it may be useful for the purposes of impeachment by the House of Representatives or the State Houses of Assembly.³⁸ This was used recently to achieve the removal of former Governor of Bayelsa State, D.S.P Alamiyeseigha after he was arrested in the United Kingdom on money laundering charges. It may also be used for the prosecution of such persons after they have left office.³⁹

The Duty of Public Accountability

The Constitution imposes on the President, Vice-President, Governors and Deputy Governors the duty to comply with the provisions of the Constitution in running the affairs of government as well as in their conduct of the affairs of the nation

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35. Through the writ of Mandamus to order relief in respect of the infringement of a public right or duty and where no effective relief can be obtained in the ordinary course of action.
36. See *Fawehinmi v. I.G.P.*, *op.cit* at p.646., See also *Per* Lord Denning M.R. in *R v. Commissioner of Police of the Metropolis ex parte Blackburn* (1968) 2 Q.B. 118 at 136.
37. See for example the case of Governor Joshua Dariye of Plateau State who was questioned on money laundering allegations in the United Kingdom, and returned to Nigeria to continue in his office as Governor; The Deputy Governor of Delta State, Benjamin Elue who was investigated for gun-running was also protected by the immunity clause. See Olu Obafemi: "Resurrecting the Debate on Executive Immunity," *Daily Sun*, January 20, 2004, back page.
38. See section 188 of the Constitution. The Constitution uses the word "removal" as opposed to "impeachment."
39. See *Tinubu v. I.M.B Securities*, (*supra*).

as a whole. Public Accountability simply put, is the responsibility of public officers and institutions to the populace, including a willingness to submit to scrutiny.⁴⁰

According to the Constitution, executive power shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.⁴¹

It also states that such executive powers shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws.⁴²

By the nature of their offices, the President and the State Governor are given the power, and also have imposed on them, the duty to run the affairs of the nation, not only in accordance with the provisions of the Constitution and the law, but also in the spirit of the Constitution and for the welfare of the people.⁴³

Government is primarily set up to ensure the security and welfare of the people.⁴⁴ Sovereignty, in the words of the Constitution belongs to the people from whom government through the Constitution derives all its power and authority.⁴⁵ The Constitution ensures the participation by the people in the government.⁴⁶

Going by the procedure laid out in the Constitution for the removal of such persons, it is largely at the discretion of the

40. See Bolaji Owasanoye: "Transparency, Accountability and Good Governance under the 1999 Constitution" in I.A. Ayua *et al eds: Issues in the 1999 Constitution*, 2000, Nigerian Institute of Advanced Legal Studies, Lagos, p.235.

41. See section 5(1) (b) of the 1999 Constitution.

42. See sections 5(1) (b), *ibid.*

43. See Oluwadare Aguda: *op. cit.*, p.161.

44. Section 14 (2) (b) of the 1999 Constitution.

45. Section 14 (2) (a), *ibid.*

46. Section 14 (2) (c), *ibid.*

legislature, that is, the elected representatives of the citizens.⁴⁷ Even though it can be argued that political interests might play a larger role than the people's welfare in the use of this legislative discretion, it is in the spirit of the Constitution that such discretion be used for the national interest.

The expectations of good-governance by the people is mainly vested in the President, Vice-President, Governors and Deputy-Governors. They, as well as the other organs of government, have the economic objectives to, among others, "harness the resources of the nation and promote national prosperity and an efficient, dynamic and self reliant economy,"⁴⁸ as well as "control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity."⁴⁹ They, therefore, have the corresponding duty to the public to account for how the machinery of government is being run.

The Abuse of the Immunity Clause

The issue of executive immunity has been the subject of litigation in quite a number of cases. In *Obih v. Mbakwe*,⁵⁰ the Supreme Court stated that the reason for the inclusion of the Immunity Clause into the 1979 Constitution was to prevent the Governor from being inhibited in the performance of his executive functions by fear of civil or criminal litigation during his tenure as Governor.⁵¹

47. See sections 143 and 188 of the 1999 Constitution. See also *This Day* of October 17, 2006 where the speaker of the Ekiti State House of Assembly said shortly after an impeachment notice was served on the Governor, that impeachment had become paramount if members of the House would escape being stoned on the streets by the people of the State.

48. See section 16 (1)(a) of the 1999 Constitution.

49. Section 16 (1) (b), *ibid*.

50. (1984) 1 SCNLR 192 at 211.

51. See also *Alamiyeseigha v. Yeiva* (2002) 7 NWLR (Part 767), p.581 where the Court of Appeal restated the intendment of section 308 of the 1999 Constitution following the Supreme Court position in *Obi v. Mbakwe* (*supra*).

The rationale for the immunity from suit, arrest or imprisonment and from court processes requiring or compelling the appearance of persons covered by the Immunity Clause is to give the office they hold, the dignity, esteem and respect that go along with it. In the words of Ben Nwabueze:

“The special protection afforded by the immunity is for the office, not for its individual holder as such. It is the majesty and dignity of the nation as symbolized by its Head that is at stake. To drag an incumbent president to court and expose him to the process of examination and cross-examination cannot but degrade the office.”⁵²

While not denying that the Immunity Clause may be a “necessary evil”⁵³ in a democracy since the beneficiaries of immunity are vested with significant powers that directly or indirectly affect the collective well being of the citizens, the debate on the abuse of the Immunity Clause has become heated in recent years. The rationale of the continued relevance of the Immunity Clause has been questioned and countered with the accountability of the beneficiaries.⁵⁴

This is mainly due to the high level of corrupt practices being accredited to many State Governors who hide under the Immunity Clause to escape being tried. In recent years, a good number of State Governors have come under the searchlight for the abuse of the Immunity Clause. The general malaise of corruption, money laundering, illegal diversion of public funds,

52. Ben Nwabueze: *Constitutional Democracy in Africa* (Volume 1), Spectrum Books Limited, Abuja, Benin City, Lagos, Owerri, 2003, p. 340, see also John Ademola Yakubu: *op.cit.*, p. 247.

53. “Immunity Clause is a necessary evil, says Nwabueze” in *Daily Independent*, January 14, 2005, p.A6.

54. See generally, Deji Adekunle: *The Constitutional Immunity of Elected Officials in The Uwais Court: The Supreme Court and the Challenge of Legal Development (1995 - 2006)*, Nigerian Institute of Advanced Legal Studies, Lagos, 2006, p.123.

receipt of illegal goods among others has eaten deep into the fabric of many State Governments, one of the more recent of which led to the "Impeachment saga" that played out in Ekiti State. The Governor, Ayo Fayose was accused of several offences including the illegal diversion of N11.7 billion local councils' funds and 1.3 billion Ekiti Integrated Poultry Project funds, the receipt of 37,000 Pounds in illegal gifts as well as possession of property running into millions of Naira.⁵⁵ Before the crisis in Ekiti, other State Governors had come under the searchlight for similar acts. Governor Dariye of Plateau State was under probe for allegedly fiddling with N1.6 billion ecological fund belonging to the State⁵⁶ while former Governor Alamieyeseigha of Bayelsa State was impeached by the State House of Assembly and is now facing several charges of money laundering.

With the problem of the high indices of corruption in Nigeria, it has been argued that the Immunity Clause will only act as a protective shield, making it difficult to curb the problem of corruption in the country.⁵⁷

Call for the Removal of the Immunity Clause

The call to expunge section 308 of the 1999 Constitution which provides immunity from legal proceedings for the President, Vice-President, Governors and Deputy-Governors was on the front burner of the National Assembly Joint Committee on the botched review of the 1999 Constitution. The idea was to remove the part of the section giving the persons mentioned immunity

55. See *Thisday* Newspaper of October 17, 2006, p.18.

56. See report of *The News Magazine* of 16 October 2006, p.50. He was consequently impeached.

57. Nuhu Ribadu: "Obstacles to Effective Prosecution of Corrupt Practices and Financial Crime Cases in Nigeria," in Oladele Balogun: *African Leaders and Constitutional Immunity: The Moral Question* available at <http://www.gsu.edu/wwwphl/ethics/africaconference/papers/Balogun.pdf>. visited on 10.10.06.

from criminal proceedings while retaining immunity on civil matters.⁵⁸

In Nigeria's nascent democracy where the fight against corruption is only beginning to gain grounds, it is argued that the quality and minds of many who seek and obtain political power is dismally suspect and abysmally poor. Commenting on Executive Corruption during Nigeria's second republic under the 1979 Constitution, it was observed that by 1979, Nigeria was earning oil revenue at the rate of 29 billion dollars a year. Much of that windfall was however looted by the ruling elite at the rate of 25 million naira a day.⁵⁹ Corroborating this, a member of the United States House of Representatives stated that "Nigeria's national treasury is systematically looted by government officials. Roughly 3,000 officials now have Swiss Bank Accounts totaling 33 billion dollars."⁶⁰ More recently, it was reported in the media that an international report indicated that looted funds kept in foreign accounts by Nigerian public officials had risen from 50 billion dollars to 100 billion dollars in the last six years.⁶¹ Although it may be the case that this figure is exaggerated, there is no doubt that there has been an exponential rise in massive transfer of looted state funds abroad since 2000.

Experience over the years has shown that executive office holders in Nigeria at the state and federal levels of Government have employed the protective shield provided by the Immunity Clause to commit fraud, loot the treasury, subvert the principle

58. See *This Day* March 11, 2006, front page. See also the report of the National Constitutional Conference Committee on Civil Society, Labour, Trade Unions and National Media, Vol.1 Chapter 18 paragraph 1.18.2 (xxii) as quoted in Deji Adekunle, *op.cit.* p.138, Recommendations of the Committee on Judicial and Legal Reforms of the National Political Reforms Conference held in May 2005; Chidi Anselm Odinkalu: *Legal Reforms on the Confab Agenda, Open Justice Initiative* at http://www.justiceinitiative.org/db/resource2?res_id=102742. visited on 01.11.2006.

59. George Ayitteh: "The Real Foreign Debt Problem," *The Wall Street Journal*, April 8, 1984, p.30.

60. Robert Dornan: *Tell Magazine*, October 18, 1993, p.10.

61. Dayo Aiyetan: *Tell Magazine*, October 17, 2005, p. 27.

of public accountability and engage in sundry acts which undermine the integrity of their office and the interest of the people they govern. The net result of non-accountability and executive profligacy in the management of public funds is the monumental corruption in the land, which "has rendered Nigeria morally bankrupt, stifled development, made nonsense of the rule of law and made democracy impossible."⁶²

The question of sensitivity in governance or moral integrity, such that would warrant voluntary or induced surrender of power when the character of the holder of high office is in criminal dispute is practically non-existent.⁶³

These factors, among others have given rise to the call for the removal of the Immunity Clause from the Constitution. This is being made despite the fact that the immunity is only for the period of time during which the person holding such office is required to perform the functions of the office. In other words, the prosecution for corrupt practices and other offences leveled against persons covered by the Immunity Clause is not barred but only postponed to such a time when the person concerned ceases to hold the office.⁶⁴ This principle was again restated by the court in *Abacha v. F.R.N*⁶⁵ where the issue of the scope of the Immunity Clause was raised. Here, the appellant's father, the late General Sani Abacha, was head of State between 1993 and 1998. He transferred various sums of money from the coffers of the Federal Government and the Central Bank of Nigeria under the guise of national security and other urgent national matters, to foreign bank accounts. On the issue of the scope of immunity, the Court of Appeal stated as follows:

62. Sonny Akpose: *The Guardian*, December 10, 1993.

63. Dayo Alalade: Executive Constitutional Immunity is an Absurdity that Merits Immediate Removal available at <http://nigeriaworld.com/articles/2005/nov/304.html> visited on 10/10/2006.

64. See *Tinubu v. IMB Securitie*, *supra*.

65. (2006) 4 NWLR Part 970 at p.239.

“Under our law the question of immunity covers the period the office holder is in office and not when his term of office has expired.”⁶⁶

This ‘lapse’ of immunity with the end of tenure of beneficiaries was also the case following the impeachment of the former Governor of Bayelsa State who is currently facing corruption charges.

A Comparative Analysis

While Executive immunity clauses are not uncommon in a democracy, many countries are wary of including a blanket immunity clause as is the case under the Nigerian Constitution. The Constitution of the United States of America for example confers no immunity on the President such as corresponds with that under section 308 of the 1999 Constitution. In the United States, all officers are subordinate to the law and must obey its mandate.⁶⁷ Even though the American Constitution does not provide for Executive Immunity, case law has developed so far that immunity is granted based on notions of public policy and convenience.

In the case of *Nixon v. Fitzgerald*,⁶⁸ the Supreme Court provided the President with the protection of absolute immunity. The case involved the plaintiff who lost his job as an employee of the Department of the Air Force. He sued various government

66. Per Adeleke J.C.A at p.311, *ibid*. This rule was followed by the United States of America recently when Governor Ernie Fletcher of Kentucky was indicted on charges alleging his administration rewarded political supporters with protected state jobs after he took office in 2003. The Court ruled in August 2006 that Fletcher is protected by executive immunity and cannot be prosecuted while in office. The motion to dismiss was however denied. The criminal trial will be delayed until he is either impeached or out of office. This affirms the principle that no one is above the law. See “Breaking News: Fletcher Can’t be Tried while in Office”, *The Daily Independent Online* at http://www.dailyindependent.com/statenews/local_story_223141128.html. visited on 27.10.2006.

67. See generally, Ben Nwabueze: *op. cit.*, p. 342 and 343.

68. (1982) 457 U.S. 731.

officials, including former President Richard Nixon. The Court considered at length the Constitution, legislative history, case law, the separation of powers doctrine as well as public policy. Based on its findings, it held that the President should enjoy the protection of absolute immunity from civil suits.⁶⁹ This was so as not to impair the President's capacity to perform his duties. Justice Powell in the *Fitzgerald's* case stated as follows:

"The President faces issues and makes decisions on matters that are far-reaching, very sensitive, and likely to arouse the most intense feelings. It is in the public interest for the President to have the opportunity to make these decisions efficiently, skillfully, and without fear of civil liability"⁷⁰

As pertains to criminal suits, American Presidents do not enjoy absolute immunity. In *Nixon v. Administrator of General Services*⁷¹, a balancing test was set forth. Under the test, before a court may exercise jurisdiction over the President, it must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the President and the executive branch. When using this balancing analysis in a criminal prosecution, the balance would weigh in favour of permitting prosecution.

Even though the Supreme Court in the *Fitzgerald* case held that the president had absolute immunity from liability in civil suits, it emphasized that the ruling would not put such Executives above the law as there was not only the option of impeachment but also the constant and unwavering scrutiny by the media. This "constant and unwavering scrutiny by the media" though quite

⁶⁹. See also, *Jones v. Clinton* 520 U.S. 681 (1997); Amy Marshall: *Jones v. Clinton*: Reconsidering Presidential Immunity available at law.richmond.edu/rjolpi/issues_Archived/1996_FallAmerican_Presidency/MARS_HALL-htm, visited on 27.10.2006.

⁷⁰. Judgment at p. 752.

⁷¹. 1977 433 U.S. 425 .

visible in Nigeria's present democracy, is unlikely to shame a person enjoying immunity in Nigeria into resigning voluntarily when found wanting. According to the Head of Nigeria's Economic and Financial Crime Commission, thirty-three out of the thirty-six State Governors are under investigation for alleged corrupt practices. They run their States like personal fiefs. They do not feel obliged to be responsive to the voters since most of their allocation comes from the federal government.⁷²

Again, in the Philippines, the Constitution does not provide for presidential immunity from suit. Basis for the immunity is only found in jurisprudence which by virtue of their Civil Code forms a part of the legal system.⁷³ The purpose of the immunity was discussed in the case of *Soliven et al v. Judge Makasiar*⁷⁴ where the Supreme Court of the Philippines stated that:

"The rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all the office-holder's time, also demands undivided attention."⁷⁵

It is interesting to note that unlike the Courts in Nigeria have ruled, in the *Soliven* case mentioned above, the Court held that nothing prevented the President from waiving the privilege of

72. "Capping the Well-heads of Corruption" in *This Day*, 21/10/2006.

73. Article 8, The Civil Code of the Philippines, Republic Act No. 386 of June 18 1949, available at <http://www.chanrobles.com/civilcodeofthephilippines.htm> visited on 01.11.2006.

74. (1988) 167 SCRA 393.

75. See also the case of re: *Saturinino v. Bernudez* (1986) where the same Supreme Court expressly held that "Incumbent presidents are immune from suit or from being brought to court during the period of their incumbency and tenure". See text at http://www.lawphil.net/judjuris/juri1986/oct1986/gr_76180_1986.html. visited on 01.11.2006.

immunity. Thus, if so minded the President may shed the protection afforded by the privilege and submit to the court's jurisdiction. In contrast, section 308 of the 1999 Constitution prescribes an absolute prohibition on the court from entertaining any proceedings, civil or criminal, against a person to whom that section applies during his period of office. There is therefore no question of waiver of the immunity by the persons protected by the Immunity Clause. This was restated in the case of *Tinubu v. I.M.B Securities*.⁷⁶

In several other countries including countries in Africa, Executive Immunity is limited to the office of the President. The section on Immunity in the Constitution of Uganda states thus:

"The President is not liable to proceedings as long as he is in the office. However, civil or criminal proceedings may be instituted against him the moment he ceases to be the president, in respect of anything done or omitted to be done in his or her personal capacity before or during his term of office."⁷⁷

In countries that operate the Constitutional Court, this has been used thwart the use of the Immunity Clause as an escapist route for corrupt officials. In Italy for example, Mr. Silvio Berlusconi was sworn in as Prime Minister for a second term in June 2001. There followed accusations of corruption which led to civil unrest and political differences with his allies. A trial was commenced but halted when the Italian Parliament largely controlled by Berlusconi's party members approved a contentious legislation giving serving Prime Ministers immunity from prosecution. The Constitutional Court however stepped in and the Immunity Legislation was thrown out. Berlusconi therefore became the first serving Prime Minister in Italian history to

76. *Supra*. Per Karibi-Whyte J.S.C at p.679.

77. See section 98 (4) of the Ugandan Constitution of 1995

appear and be convicted in court on charges of corrupt enrichment and embezzlement.⁷⁸ In Nigeria, even though the idea of having a Constitutional Court was proposed in the interim 1995 Constitution⁷⁹, it has been argued that it may create more problems than provide solutions particularly in the areas of access to justice and jurisdictional conflict. The cost implication has also been an area of concern especially as the establishment of such a court in a Commonwealth country is an aberration.⁸⁰ The creation of such Courts both at the federal and state levels came up again as a recommendation of the Committee on Judicial and Legal Reforms of the National Political Reform Conference.⁸¹ It is however doubtful that the introduction of such courts will make a significant impact on the issue of public accountability *vis-a viz* the immunity clause.

A Critical Analysis

In arriving at a conclusion as to whether or not to support the retention of the Immunity Clause in the Constitution, the logical approach will be to weigh the reason for the Clause against the harm being suffered by the existence thereof.

The provision of the Constitution on immunity from suit for public officials named therein, is a policy legislation designed to confer immunity from civil suit or criminal process and to insulate them from harassment on their personal matters incurred before their election.⁸² Governance is a serious matter. Those that are privileged to hold positions of governance, like those who enjoy immunity are vested with significant powers that directly and indirectly affect the collective well being of the

78. See Oladele Abiodun Balogun: *op.cit.* p. 15.

79. See Africa Policy E-Journal at <http://www.africaaction.org/docs98/nig9812.htm>. See also Nigeria Index at http://www.oefre.unibe.ch/law/id/ni_index.html visited on 01.11.2006.

80. These concerns were raised by the Chief Justice of Nigeria as reported by Chidi Anselm Odinkalu in Legal Reforms on the Confab Agenda, *op.cit.*

81. See Chidi Anselm Odinkalu, *ibid.*

82. *Per Karibi-Whyte J.S.C in Tinubu v. I.M.B. Securities supra.*, p.675.

citizens. It is therefore in the interest of the nation that persons holding such offices can function without undue hindrances.

With Nigeria's nascent democracy, the removal of the Immunity Clause may produce a situation where the system is manipulated to harass and intimidate these office holders with criminal and civil processes, thereby exposing them to unnecessary distractions in the course of their tenure. Based on the recognition of these possible abuses, the Immunity Clause is provided for in the Constitution to protect this category of public officers against wanton arrests and law suits.⁸³

Immunity however is not to be equated to impunity.⁸⁴ There is no interpretation of the Immunity Clause that permits this category of public office holders to commit crimes and go free. Immunity is only for the duration of the office. As soon as the officer enjoying immunity leaves office, he becomes answerable for any criminal and civil action. The Constitution offers neither a time bar nor an expiry date for such prosecution. Even in civil cases where time may act as a bar to the institutions of certain actions, time only begins to run when the action has accrued, that is, when the public officer leaves office and becomes liable.

It is not in doubt that the chances are that a corrupt official, knowing the likely consequences of his corrupt practices after he leaves office, would do his utmost to hide traces of monies or properties illegally accrued or seek refuge in another country. The war on endemic corruption has however only now began to take shape and with Nigeria's history of frequent military intervention, it might be a bit too soon to draw the conclusion that very few corrupt officials have been brought to book after their tenure.

The military took over power from the Shehu Shagari led democratic regime after the botched presidential elections in 1983 and remained in office until 1999. It has been the view of

83. See generally, Edo Ukpong: "Stupid Immunity Syndrome" in *This Day*, April 5, 2005, p.59.

84. See Deji Adegunle: *op. cit.* p. 137

many that this era brought along with it an unprecedented degree of economic mismanagement. The reckless and destructive level of corruption and the total disregard for the rule of law rendered rationality in the conduct of public affairs impossible. Referring to a transition programme initiated by former military Head of State, General Ibrahim Babangida, a conclusion was reached thus:

“The military’s political transition in Nigeria must be judged a sweeping and unambiguous failure. It failed to return the country to civilian rule (much less to democracy). It failed to bring forth a new political structure. It failed to control corruption and improve accountability.”⁸⁵

With the transition to, and hopefully sustainable democratic system, there is renewed hope that things will get better in Nigeria. The efforts still being made to recover illegal money looted from the government treasury by the former military Head of State Sani Abacha from members of his family despite his demise is encouraging.⁸⁶ Even seeking cover from prosecution in foreign countries may no longer be a very attractive option against the backdrop of the ever increasing globalization of justice. Regarding the change in attitudes of western countries in welcoming “dirty money” into their economies while offering a roof for perpetrators of money laundering, it is a fact that the volume of illicit money being channeled to finance terrorism has accounted for the far-reaching changes in the laws of western countries relating to the transfer and banking of funds and the criminalization of the concealment of such illegal money.⁸⁷ The

85. Larry Diamond, A. Kirk-Green and Oyeleye Oyediran, eds: *Transition Without End – Nigerian Political and Civil Society Under Babangida*, Vantage Publishers, Ibadan, 1996, p.xvii.

86. See *Abacha v. F.R.N. supra*

87. See Deji Adegunle: *op. cit.* p.136.

recent focus on corrupt Nigerian officials has raised the sensitivity to illegal financial transactions in many countries.

Even during the tenure of persons who enjoy immunity, citizens have the opportunity, through their elected representatives⁸⁸ to impeach such persons for a breach of the provisions of the Constitution, or for misconduct of such nature that amounts, in the opinion of the National Assembly or State Assembly, as the case may be, to gross misconduct.⁸⁹ The provision for the removal of these category of public holders is certainly a device to prevent the Immunity Clause from becoming a total shield to holders of these offices who have, in the opinion of the citizens through their representatives, conducted themselves unacceptably and are therefore not worthy of the protection afforded by the Immunity Clause.⁹⁰

The immunity from prosecution and civil action granted under section 308 of the Constitution is tempered by the provisions in the same Constitution demanding accountability from public officers. The Constitution contains far reaching provisions meant to ensure public accountability and to check fraud and financial excesses by members of the executive.

Recognizing the sweeping powers given to the President and Governors by the Constitution to control and disburse public funds, the Constitution provides that such disbursement of public funds can only be made in accordance with the Appropriation Bill, duly passed by the Legislature.⁹¹

88. That is, the House of Representatives or the State Houses of Assembly as the case may be.

89. Section 188 (11) of the 1999 Constitution.

90. The impeachment clause has been described as "a major weapon of check-and-balance in the Nigerian 1999 Constitution to check the abuse of enormous executive powers exercised and ex of check-and-balance in the Nigerian 1999 Constitution to check the abuse of enormous executive powers exercised and exercisable by elected functionaries of the executive arm of government". See Ajayi Olatunji: *The Gale of Impeachment and Constitutional Intricacies* at nigeriaworld.com/articles/2006/oct/098.html. visited on 02.11.2006.

91. Sections 81 and 122 of the 1999 Constitution.

Beyond that, the Attorney-General of the Federation and the States are directed to audit the public accounts of the Federation and of the States and submit same to the National Assembly and State Houses of Assembly.⁹²

The Legislature at the federal and state levels of government are also empowered by the Constitution to carry out oversight activities on the conduct of the affairs of public officers and government departments charged with the disbursement of funds.⁹³

The aforementioned provisions of the Constitution provide that the purpose of the investigative power given to the Legislature is to, among others, expose corruption, inefficiency or waste in the disbursement or administration of funds appropriated by it.⁹⁴ They have been described as "a watchdog of public funds".⁹⁵ Even though this section does not constitute the Legislature into a universal "Ombudsman" inviting and scrutinizing the conduct of every member of the public for the purposes of exposing corruption, they can, as the Court of Appeal stated in a general guide on the issue in the case of *Senate of the National Assembly & Ors v. Momoh*,⁹⁶ invite government functionaries when they want to gather facts for the purpose of enabling them make laws or amend existing laws in respect of any matter within their legislative competence or as witness in a properly constituted enquiry. In the United States case of *Watkins v. United States*,⁹⁷ the Supreme Court, while

92. Sections 5 and 125, *ibid.* see also D.A Guobadia: "The Legislature and Good Governance under the 1999 Constitution" in Ayua *et al eds: Issues in the 1999 Constitution*, 2000, Nigerian Institute of Advanced Legal Studies, Lagos, p. 47 and 52

93. Sections 88 and 128, *ibid.*

94. Sections 88 (2) (b), 128(2)(b).

95. Ameze Guobadia: "The Legislature as a Watchdog of Public Funds" in I.A. Umezulike ed. *Towards the Stability of the Third Republic*, 1993, Fourth Dimension Publishers for the Federal Ministry of Justice, p.73.

96. (1982) 2 F.N.L.R. 307.

97. 354 U.S. 178, 187 (1957).

construing a similar provision on the powers of the Legislature to carry out its oversight functions stated that:

“It compasses inquires concerning laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”

In another case, *McGrain v. Daugherty*,⁹⁸ the U.S. Supreme Court stated that to compel attendance to give information resolution of Congress must not expressly state that the investigation was in aid of legislation as long as it falls within the jurisdiction of Congress.⁹⁹

While agreeing that the investigative powers of the Legislature has its limitations¹⁰⁰, being among other things, subject to the provisions of the Constitution¹⁰¹ (and therefore to the Immunity Clause) and also taking into account the doctrine of separation of powers, it is the duty of the Legislature to consider and pass some or all proposals in an Appropriation Bill.¹⁰² In doing so, they are expected to protect the interests of their constituencies with the sole motive of doing what is best for the State or country.¹⁰³

98. 273 U.S. 135 (1927).

99. See also Sebastine Tar. Hon: *Constitutional Law and Jurisprudence in Nigeria*, Pearl Publishers, Port-Harcourt, 2004, p.169.

100. See Abiola Ojo: *The Investigatory Powers of the National Assembly under the 1989 Constitution: Sections 86 and 87 Considered in Democracy Beyond the Third Republic*, Fourth Dimension Publishers, Enugu, 1993, p.107.

101. Section 88 (1)

102. See Uche Omo: *Separation of Powers: Managing the Legislative, Judicial and Executive Relationships in a Democratic Polity in Democracy Beyond the Third Republic*, op.cit, p.7.

In the wake of the massive official corruption Nigeria has witnessed in the past seven years and also considering the interdependency of one arm of government on the other, it is unfortunate that the legislature has failed to exercise their investigative powers of ensuring that public funds are disbursed in accordance with the Appropriation Bill and in the interest of the people they represent. They have rather employed their power of appropriation and investigative (oversight) powers not as a tool to advance good governance, but rather as a weapon to extort from the executive, their own share of the national loot.¹⁰⁴

The Oath of Allegiance which must be sworn to by persons protected by the Immunity Clause before taking office is also provided by the Constitution to act as an incentive for occupants of such sensitive offices to perform their duties so as to "preserve, protect and defend the Constitution."¹⁰⁵ Such executive officers affirm in the Seventh Schedule of the Constitution to abide by the Code of Conduct as contained in the Fifth Schedule to the Constitution. The Code of Conduct prohibits several acts of misconduct by public officers. These include the prohibition of foreign accounts, receipt of gratification in carrying out his duties, bribery, abuse of power and so on.¹⁰⁶

The Constitution does not provide any exception from liability for executive immunity holders from the Code of Conduct Tribunal as provided for by the Constitution.¹⁰⁷ For the purposes of the Code of Conduct, public officers include the President, Vice-President, Governors and Deputy-Governors.¹⁰⁸ It therefore follows that despite the fact that prosecution under the Code of Conduct Tribunal takes the form of a criminal trial, it cannot be put on the same footing as a criminal trial.

104. See Bolaji Owasanoye: *op.cit.* p. 235 at 241.

105. See the Seventh Schedule of the 1999 Constitution.

106. Sections 1 to 10 of the Fifth Schedule, *ibid.*

107. Section 15 of the Fifth Schedule, *ibid.*

The Constitution, going by the above clearly provides for checks against abuse by members of the executive, among others. However, the body in charge of investigating cases of abuse has not stood up to its responsibilities. This could be for a number of reasons ranging from the lack of funds, their independence on the Executive or on the fact that the Attorney-General - himself an appointee of the President is given the prerogative to institute proceedings.¹⁰⁹

Recommendations

This chapter holds the view that despite the arguments put forward for the removal of the Immunity Clause from the Constitution, it will not be in the best interest of the nation to do so. This is in order to check unnecessary litigation against executive office holders and protect them from undue distraction from running the affairs of the nation and the states.

Even if the Immunity Clause is expunged from the Constitution, it is doubtful if proper and effective investigation could be carried out against an incumbent President, Vice-President, Governor or Deputy-Governor and a fair and just trial conducted against such an officer. This is because even without the protection of immunity, such an officer will most probably use the weight and influence of his office to interfere with and frustrate investigations against him. In the same way, he will also influence the course and outcome of his trial in Court.

The Constitution has adequately empowered the legislature to impeach members of the executive who have committed gross misconduct which include corruption and fraud. Removing the coat of immunity from the office of the Vice-President, Governors and Deputy-Governors while leaving that of the President as has been suggested, does not change much in terms of the reasons canvassed for the removal of the Immunity Clause.

109. Cap. 56 LFN 1990.

Against this backdrop, it is our recommendation that while retaining the Immunity Clause for the office of the President, Vice-President, Governors and Deputy-Governors, legal guarantees for open government should be put in place. Through access to public records for example, the tendency to divert public funds to private use will decline, especially in a democratic setting where such office-holders usually strive for either second terms or other offices in the future. Following the recent passing of the Freedom of Information Bill¹¹⁰ into Law, the right of access to public information will be ensured. This will promote the accountability of public officers.

It is also our recommendation that a substantive Minister for Petroleum/Solid Mineral Resources be appointed by the President upon prior recommendation and subsequent approval of the National Assembly. Considering that the bulk of the nation's foreign exchange earnings come from the petroleum sector, it ought not to be in the absolute control of the office of the President who enjoys immunity from suit. Ministers can be more easily checked for corrupt practices and removed. They also do not fall under the category of officers protected by the Immunity Clause and can therefore be more easily prosecuted for corrupt practices.

Again, to insure against absolute control, it is imperative that the Constitution be amended to grant local governments financial and administrative autonomy from the States.¹¹¹ The Constitution by virtue of section 7(1) provides that the system of local government by democratically elected local government councils is guaranteed and accordingly, the government of every state

110. A Bill for an Act to make public records and information more freely available, provide for public access to public records and information, project public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorisation and establish procedures for the achievement of those purposes and related purposes, 2006.

111. Section 7(1) and 162(1) of the 1999 Constitution.

shall ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.¹¹² By virtue of section 162 (5), the National Assembly is constitutionally empowered to prescribe the terms and manner governing the disbursement of the funds due to the local governments and paid to the States for the benefit of their local government councils.¹¹³

The Nigerian example has shown that many state governors divert the allocations for the local government councils to other uses. This, among other things has led to the impeachment process being entered against such governors. Where the local government councils get their financial allocations directly from the federation account, there will be more scrutiny as to the use or misuse of public funds. This is because local government chairmen who will then be in direct control cannot hide under the umbrella of immunity. Also, the councilors who work closely with the chairmen and who are elected from the various wards under the local government councils will act as watchdogs for funds to their wards. Such officials can also be much easier removed than the governors.

Reckless spending, mismanagement, embezzlement and the lack of accountability puts the economy under strain. With a fiscal responsibility legislation entrenched in Nigeria, transparency will be enforced. The passing of the Fiscal Responsibility Bill which has passed its second reading before the National Assembly will help to ensure fiscal prudence and mutually supportive coordination among all tiers of government.

With all these checks in place, the problem of the lack of public accountability will reduce. This, in our view will yield better results than expunging the Immunity Clause as this does not necessarily solve the problem of the abuse of office.

2. See also *A.G. Abia v. A.G. Federation* (2002) 6 NWLR, Part 763, p. 265 at 319, Per Kalgo, J.S.C.

3. See also *A.G. Lagos State v. A.G. Federation* (2004) 18 NWLR, Part 904, p. 11 at 35, Per Akintan J.S.C.

Conclusion

The removal of the Immunity Clause from the Constitution will not solve the problem of abuse of office and the lack of public accountability by executive office holders. The provision on immunity was inserted into the constitution after serious thought and consideration was given to it and the removal should take long term interests and expectations into account. Considering the nature of the Nigerian society and current state of development, it is more convincing that the retention of section 308 conforms more to maximize the fulfillment of the interests of the community and promote the smooth running of the machinery of society than its removal.

The proper implementations of the provisions already stated in the Constitution to check the misuse of public funds, taken together with the recommendations put forward by this chapter will go a long way to ensure that members of the executive protected by the Immunity Clause remain accountable to the citizens.

10

THE POLITICS OF IMPEACHMENT: THE NIGERIAN EXPERIENCE

by

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“WE have learned in the past few months the perils of democracy in the evolving drama of our nation. Nothing demonstrates this more than the spate of impeachments of state executives. And a cardinal casualty is legitimacy. Where legitimacy is questionable, democracy cannot thrive.”¹

“A drift to anarchy has long been suspected within the polity. But it does appear that Nigeria is now in for a full blown democratic dictatorship. The tacit approval of and support for illegality being perpetrated in some states of the federation suggest that there may be a hidden agenda yet unknown to Nigerians. The impeachment of Governor Ayo Fayose of Ekiti State is a clear case of dreaded descent to anarchy:”²

Introduction

The gale of impeachments that recently hit the polity has swept five State Governors – those of Bayelsa, Oyo, Ekiti, Anambra and Plateau – out of office. While the details of these impeachments might vary, the manner of their execution tends to fit into a pattern, one in which allegations of wanton disregard

¹ The *Nation* Editorial, November 15, 2006 at p.1.
² The *Nigerian Tribune* Editorial, October 17, 2006 p. 1.

or due process are a clear feature. This is what a national daily,³ on a front page analysis has aptly portrayed as "Unconstitutionality as Normality". The analysis under reference came up a day after the Governor of Plateau State, Joshua Chibi Dariye was 'impeached' by a "six-man" House of Assembly.

The Guardian newspaper captured the details of this impeachment as follows:

The six law-makers had arrived in Jos, the capital of Plateau State at about 4:00am amidst tight security and proceeded to the chamber of the State House of Assembly complex where they sat for about 40 minutes to deliberate on the interim report of the investigative panel probing the governor over alleged abuse of office and other financial offences. The Chairman of the Panel, Chief John Mark Samci, a source said, was called upon late Sunday night to prepare his report based on the document in his possession and be ready to submit it to the six member House of Assembly.

At the Chamber of the House where the impeachment process was conducted, only the six law makers, the clerk of the House, Mr. Cornelius Shibolal, who has been in the EFCC custody, two members of the Investigative Panel and Security operatives were present, it was gathered.

According to a source close to the Panel, the lawmakers and other external forces moving for the impeachment did not wait for the full report of the Panel because of the fear that four members of the Panel were planning to opt out and that the

3. *Daily Independent* of Tuesday November 14, 2006.

Court of Appeal might also grant an injunction against the sitting of the Panel.

Immediately the House of Assembly members finished their sitting, they were driven back to Abuja under security escort, while another crop of security men were deployed in Ray Field Government House and other strategic parts of the towns.⁴

In the *Daily Independent* analysis referred to earlier, the point was made that "Not even during the military dictatorial regimes did Nigeria witness brazen acts of illegality, so perpetrated with impunity as they are in the present democratic dispensation". The paper, in its Editorial⁵ on the imposition of a state of emergency in Ekiti State, captioned "Constitutionalism in Reverse: The Looming Anarchy" (page B4) has noted that "with the way legislators have conducted themselves in Bayelsa, Oyo and Ekiti and are going about their business in Plateau and Anambra we fear for the life of this country. Politicians are bent on side tracking the constitutional formula for political succession and transfer of power. We see a trend whereby political parties that are supposed to inject and canvass enduring democratic norms into the polity are using 'self-help' methods to hijack incumbency and position themselves favourably at the next polls. What is happening and the tactics of the legislators in Plateau and Anambra are more than political gerry mandering but a calculated attempt to subvert the sovereignty of the people of Nigeria."

No doubt, the "constitutional altercation" (apology to The *Sunday Vanguard* of October 22, 2006 p. 10) arising from the gale of impeachments blowing across some states of the federation has created credibility crisis for democracy and its current operators in the country. It has placed the country

4. Tuesday November 14, 2006 p. 1.

5. Monday, October 23, 2006.

between Politics and Legality”, and generated a crisis of legitimacy, a situation not helped by the scenario in Oyo State where the Court of Appeal, Ibadan Division, had declared as unconstitutional; null and void the impeachment of the State Governor, Senator Rashid Ladoja but the latter has been unable to return to his office. The Attorney-General of the Federation and Minister of Justice, Chief Bayo Ojo SAN, is reported to have advised the Governor to shelve his planned return to office until the Supreme Court’s verdict on the controversy is known. He advised Ladoja not to adopt “self-help” in reclaiming his mandate since “an appeal had been filed against the Court of Appeals judgment that restored the governor’s mandate.”⁶ The Inspector-General of Police Mr. Sunday Ehindero, had earlier also advised Senator Ladoja against moving into Ibadan, the Oyo State Capital, to resume office “on security grounds.”⁷

As *The Guardian*⁸ has observed; “(The Attorney-General’s) declaration may have opened a new vista in Nigerian’s jurisprudence, particularly on the right of a litigant to enforce his legal victory pending the outcome of a possible appeal”. While the minister had noted that an “appeal simpliciter does not operate as a stay of execution” he however, added that “where a party has exercised his right of appeal and also filed an application for stay of execution or injunction pending the determination of the appeal, the successful party ought to refrain from enforcing the judgment until the pending appeal has been determined.” Otunba Alao-Akala who had succeeded Ladoja following his impeachment in January, 2006 was emphatic that:

“nothing has changed. I remain...the Executive Governor of Oyo State. While this is a legal matter the political implication and call to anarchy is too grave to be ignored. As the Chief Security Officer of

The Guardian of Monday, November 6, 2006 p. 1.

Ibid.

Ibid.

the State, I want to assure you that I will not abandon my responsibility in ensuring that lives and properties are protected. The State Government of which I am the Chief Executive remains functional and firmly in control while the legal luminaries representing members of the Oyo State House of Assembly are responding adequately to the issue at hand.”⁹

The Inspector General of Police Mr. Sunday Ehindero was also reported to have declared that the judgment of the Court of Appeal which voided the impeachment of Ladoja is unenforceable.¹⁰ Mr. Ehindero said the Appeal Court’s judgment was “declaratory” and therefore “unenforceable”. In his words:

“I received the legal advice from the AGF (Attorney-General of the Federation) office in relation to the declaratory judgment of the Court of Appeal in Ibadan given last week. However, having read the papers, I am convinced that the press has already known what the position is and they have got the advice of the AGF. But for the purpose of emphasis, let me say that when the declaratory judgment was received and Senator Ladoja wrote me in relation to his assumption of office and also his security, I wrote to him that he should defer his assumption of office and his visit to Adamasingba and to the Olusadan of Ibadan until I received the legal advice of the AGF, and of course, I sent the judgment to the AGF for his advice and promptly. I received the advice yesterday and I thought it is proper for me to inform you about the legal advice.”

⁹. *Nigerian Tribune* of Friday, November 3, 2006 p. 30.

¹⁰. *The Guardian* of November 7, 2006 p.12.

The Inspector-General of Police then continued: "I want to say that even before I received the legal advice, I gave Senator Ladoja security, mobile policemen. The major import of what he (GF) is saying is that a declaratory judgment is not like any other judgment. A declaratory judgment merely states what the law is, and the rights of the parties. It is not a judgment that can be enforced. A declaratory judgment is like a toothless dog that can bark but cannot bite. You can't enforce it. The police cannot be held for disobedience of the law by not enforcing it. So that is the import of the advice. There are Supreme Court cases and I have also refreshed my memory by reading some of the cases. In other words, what we are saying is that the *status quo ante bellum* will be maintained before the judgment of the Court of appeal was given. However, when the Supreme Court now sits and determines the appeal, then we can act on the orders of the Supreme Court."

Curiously, a major party to the crisis in Oyo State, Alhaji Amidi Adedibu, was reported to have declared that the Supreme Court can't save Ladoja."¹¹ To him, the only condition for Ladoja to regain his seat, "irrespective of Supreme Court's ruling, would be for him to go back to the lower court and institute a fresh action based on that." According to Alhaji Adedibu, Senator Ladoja's tenure ended on January 12 (2006) with his impeachment. He started his political career from Molete here and it ended here. The issue has ended on 12th January this year. God has ended it. Where was his seat as governor in Ibadan? It was here (Molete). He never had any campaign office; everything was (done) here. And God being so kind, when I was selecting him to be the (governorship) candidate, I selected Akala on merit. If I had allowed him to field his own candidate, Oyo State would have been very hot now."¹²

11. *The Nation* November 18, 2006 p. 1.

12. *Ibid* at p.5.

Senator Ladoja, was reported to have, through his counsel, faulted the Attorney-General's advice.¹³ According to his counsel, Mr. Yusuf Alli (SAN). "It is unacceptable." Continuing, the counsel lamented, "The disturbing aspects are that what the AGF was reported to have said is in tandem with what Alao-Akala and his group have said. What they said was to the effect that no Jupiter can make Alao-Akala to leave the office and he has been carrying on as such. I believe the AGF should do the needful and direct all agencies to give effect to the judgment forthwith. Otherwise we are laying a very, very dangerous precedent."

Meanwhile the Inspector General of Police was reported to have apologized to Senator Ladoja's lawyers.¹⁴ The apology was sequel to a joint letter they wrote to him on November 9 wherein they raised objection to the IG's interpretation of the judgment. Although the IG agreed with the lawyer, he stated that his action was not intentional or meant to distort fact. In his words; "Perhaps I have gone beyond my mandate as the Inspector-General of Police in stating this aspect of the law. It is not for me to state the legal position. I have erred in the loneliness of my office and regret the unfortunate impression my quotation from the Court of Appeal judgment must have created. I apologise, more so when the doyens of the Bar for whom I have the greatest respect - are deeply concerned with "my quotation." As he stated further; "my comment on the declaratory judgment of the Court of Appeal was premised on the advice and the *dictum* of Niki Tobi in the case of *Const. Ltd v. Rao Investment Pro. Ltd*¹⁵ where he said:

"A declaratory order has not the force of execution. It is like a toothless dog which can only bark in his restricted home of the manager angrily

13. *The Punch*, November 6, 2006 pp. 1 and 6.

14. *The Nation*, November 16 2006 pp. 1 and 2.

15. (1992) 1 NWR (Pt. 219) 583.

and aggressively but cannot bite to vindicate his overt anger and aggression. In my view a declaratory order merely declares the right of the parties and it is dormant beyond that, without much ado, if I may say so; in the sense that there is in contra distinction no further enforcement by way of execution as is the case in some other orders of the Court. (It is) declaratory in the sense that the successful party cannot in law enforce the order. After all, there is nothing in law to enforce, as the court itself has not given an enforceable order. That is the legal position.”

The impeachment of the Governors of Anambra and Plateau States, which followed, have necessitated the intervention of the National Assembly. While it merely generated a “row” in the Senate,¹⁶ the House of Representatives, for its part, resolved to probe the Economic and Financial Crimes Commission (EFCC) and the Nigeria Police over their roles in the impeachment gale that has hit some states in recent times¹⁷ The House also vowed to subject the roles of the judiciary to scrutiny, especially as they relate to the impeachment of Governor Joshua Dariye of Plateau State.¹⁸

The Presidency, on its part, citing the principle of non-interference has distanced itself from the gale of controversial removal of governors.¹⁹ The President’s media aide was reported to have told journalists that the President was in fact not happy about the emerging trend but had remained silent on the development in line with his policy of non-interference in the affairs of the federating states. Toeing a similar line, the Speaker of the House of Representatives, Alhaji Masari was reported to

16. *The Guardian*, November 15, 2006.

17. *New Nigerian*, November 16 2006 p. 1.

18. *Ibid.*

19. *The Guardian*, November 15, 2000 p. 1.

have declared that the "autonomy" granted states by the Constitution "barred" the National Assembly from interfering in the processes of impeachment whenever initiated by any state legislature.²⁰

With one voice, the Body of Attorneys-General has also condemned the emerging pattern of controversial impeachment of governors across the country.²¹ The body particularly identified the EFCC and some state Chief Judges as major culprits in the "gross violations of the rule of law that threaten the very foundation of our democracy."

In this chapter, we intend to examine the phenomenon of impeachment in Nigeria, with particular emphasis on its associated politics. The point has been made in a different context that when we delve into the arena of politics, some of the ideals of Justice become the first casualties.²² This is so when politics becomes a competition and the pressures for victory impose new expectations and induce new behavioural patterns. Yet, if politics is about the distribution of the resources of the state and assuring who gets what and when, then, there are bound to be other new variables introduced by the very nature of human existence. This is where the politics of Justice comes in. It may seem self contradictory to talk of politics of Justice since the rights which Justice confers are not supposed to be subjects of trade, counter-trade or barter. It is a situation imposed by the reality of human existence. Yet the idea of the public good remains a key concept in the articulation of the principles of Justice²³ Thus, John Rawls²⁴ tries to find a balance between the temptations towards excesses by the various parties or interest groups in a society. As he argues, "While men may put forth excessive demands on one another, they never-the-less

20. *Ibid.* at p. 4.

21. *The Guardian*, November 17, 2006 pp. 1 & 2.

22. Kukah: *Matthew Hassan Religion and the Politics of Justice in Nigeria* (Constitutional Rights Project) (1996). P.6.

23. *Ibid.* at p. 5.

24. Rawls John: (n.d) *A Theory of Justice*

acknowledge a common point of view from which their claims may be adjudicated. If men's inclination to self interest makes their vigilance against one another necessary, their public sense of justice makes their secure association together possible. Among individuals with disparate aims and purposes, a shared conception of Justice establishes the bonds of civic friendship, the general desire for justice limits the pursuit of other interests." Thus, even, if impeachment is a "political matter," the general desire for justice should limit the pursuit of "political" interests.

The Concept of Impeachment

'Impeachment,' according to The *Shorter Oxford Dictionary* is:

"The accusation and prosecution of a person, for treason or other High Crime or misdemeanor before a competent tribunal. In Great Britain the judicial process by which any man from the rank of a peer downwards may be tried before the House of Lords at the instance of the House of Common; In the USA a similar process in which the accusers are the House of Representatives and the Court is the Senate."

Halsbury's Laws of England defines "impeachment" as a procedure by which office held by letters patent is vacated. It has its origin in English legal history and it was designed as a national inquest into the conduct of public men. As Oretuyi²⁵ has observed, before the full development of ministerial responsibility it was a useful weapon enabling the House of Commons to call to account ministers appointed by and responsible to the crown. It first appeared around 1376 and it was used exclusively for the political prosecutions of royal

25. See Akinsanya and Oretuyi "The Exercise of the Impeachment Power under the Constitution of the Federal Republic 1979. Paper presented at the 20th Annual Conference of the Nigerian Law Teachers Association, 1982 p.1.

ministers. It was however quite independent of the crown which took no part in the proceedings.

Impeachment, unlike the bill of attainder under which persons were sentenced to death without any trial in the ordinary course of judicial proceedings, involved both an indictment by the House of Commons as a grand jury of the nation and a trial at the bar of the House of Lords.

The House of Commons now appoints a committee to draw up the articles of impeachment for the approval of the House. The Commons then send the articles to the Lords with copy to the accused persons who in turn will put in his answer within a specified time. His answer is also forwarded to the Commons for replications if thought necessary. On the hearing either the Lord High Steward or the Lord Chancellor presides. The Commons attends the trial as a Committee of the whole House whilst the accused will be represented by counsel and he is privileged to call witnesses. The entire House of Lords are judges of the law and fact and each Lord is expected to return a verdict of guilty or not guilty. That is briefly the system in the U.K. The British Constitution being unwritten the system was as result of long usage as far back as 1386.

It is noteworthy that as the framers of the American Constitution toiled in Philadelphia to write the Constitution, the long impeachment and trial of Warren Hastings was in progress in London.²⁶ It was the English law of impeachment as summarized in Thomas Jefferson's *Manual of Parliamentary Practice* that was referred to and followed with some modifications in the American impeachment cases, which by 1805 was widely regarded as unnecessary because of ministerial responsibility to Parliament.

In the U.S.A. the House of Representatives, like the House of Commons in England, through one of its Committees (usually the Judiciary Committee) investigates and reports on charges that might lead to impeachment. The Committee must hear evidence

26. *Ibid* at p.2.

and if the Committee so allows, the person to be impeached may be heard and represented. If the Committee recommends charges of impeachment called "Articles of Impeachment" the House must formally adopt the charges one by one by simple majority. An affirmative vote by the House sends the Articles to the Senate for trial and final determination of guilt or innocence.

At the trial in the Senate which is by a tribunal (of 2 Senators) of the whole House presided over by the Chief Justice if the accused is the President of the U.S.A. Before the trial each senator takes an oath to "do impartial Justice according to the Constitution and Laws."

The House of Representatives is represented at the trial by Managers and the accused by counsel or appears in person. Each side will call evidence for and in rebuttal of the Articles of Impeachment.

The decision is taken in the Senate by voting on each charge of impeachment. Any article that receives two-thirds majority vote is proven and the accused accordingly convicted thereof and deemed removed from office.

Impeachment of the President/Vice-President the 1999 Constitution of Nigeria

Constitutional Provisions

The Constitution²⁷ provides as follows:

- (1) The President or Vice -President may be removed from office in accordance with the provisions of this section.
- (2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the National Assembly.
 - (a) is presented to the President of the Senate;
 - (b) stating that the holder of the office of President or Vice-President is guilty of

27. Section 143 of the Constitution of the Federal Republic of Nigeria 1999.

gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified.

The President of the Senate shall within seven days of the receipt of the notice cause a copy thereof to be served on the holder of the office and on each member of the National Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office to be served on each member of the National Assembly.

- (3) Within fourteen days of the presentation of the notice to the President of the Senate (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice) each House of the National Assembly shall resolve by motion without any debate whether or not the allegation shall be investigated.
- (4) A motion of the National Assembly that the allegation be investigated shall not be declared as having been passed, unless it is supported by the votes of not less than two-thirds majority of all the members of each House of the National Assembly.
- (5) Within seven days of the passing of a motion under the foregoing provisions, the Chief Justice of Nigeria shall at the request of the President of the Senate appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative

- house or political party, to investigate the allegation as provided in this section.
- (6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person and be represented before the Panel by legal practitioners of his own choice.
 - (7) A Panel appointed under this section shall -
 - (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the National Assembly; and
 - (b) within three months of its appointment report its findings to each House of the National Assembly.
 - (8) Where the Panel reports to each House of the National Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.
 - (9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, each House of the National Assembly shall consider the report, and if by a resolution of each House of the National Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.
 - (10) No proceedings or determination of the Panel or of the National Assembly or any

matter relating thereto shall be entertained or questioned in any court.

(11) In this section:

‘gross misconduct’ means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct.”

This provision have however not been successfully tested.

Section 188 is in similar terms in respect of Governors and Deputy Governor.

Impeachment in the Nigerian Experience The Second Republic

The Impeachment of Alhaji Balaraba Musa, Governor of Kaduna State in June 1981

Alhaji Abdulkadir Balarabe Musa, Governor of Kaduna State, was impeached in June 1981. The Notice of Allegations presented by 69 members of the State House of Assembly to the Speaker alleged several breaches of the Constitution by Governor Balarabe Musa.

In an *ex parte* motion filed at the Kaduna High Court by Alhaji Busari Obisesan on behalf of the Kaduna State Governor, the Plaintiff asked the Court to issue an *Order of Prohibition* prohibiting the Speaker and members of the Kaduna State House of Assembly from proceeding with the consideration of the purported *Notice of Allegations* of “gross misconduct” made against the Governor on six grounds.

1. that the purported *Notice of allegations* and / or the charges were not made in accordance with the provision of the Constitution;

2. that the Speaker is an interested party and his utterances have vitiated the role of impartiality contemplated for him under section 170(5) of the Constitution;
3. that the document containing the purported *Notice of Allegations* of "gross misconduct" is a forgery because thirty nine (39) of those purported to have signed the *Notice* are illiterates;
4. that the document containing the *Notice* offends against the provision of the Illiterate Protection Law 1963;
5. that the accusations contained in the purported *Notice* do not constitute the "gross misconduct" contemplated by the Constitution; and
6. that the *Notice* sacks *mala fide*.

According to Dr. Usman, the Illiterate Protection Law provided that "when an illiterate makes a mark on any document, the person who read and explained that document to him should sign alongside and also write his name and address. "That procedure, he contended, had not been followed in the *Notice* presented to the Speaker of the Kaduna State House of Assembly.

In an *ex parte* motion filed on June 2, 1981 and joining members of the Investigations Committee as Respondents, the Plaintiff, Governor Balarabe Musa, asked for an Order of Prohibition prohibiting the seven-member Committee "from proceeding or further proceeding with the investigation of the Allegations contained" in the Notice of Allegation of "gross misconduct" against Governor Balarabe Musa "until after the hearing of the substantive application." The plaintiff contended that:

"Conditions precedent to the investigation of the allegations against the Application have not been complied with and in the said premises, the

Respondents have no jurisdiction to embark upon an investigation pursuant to S. 170 of the Constitution of the Federal Republic of Nigeria 1979.”

Specifically, the Plaintiff contended:

- (i) that the Notice of Allegation “now sought to be investigation was not signed by any members” of the Kaduna State House of Assembly;
- (ii) that the detailed particulars of the alleged misconduct were not give in the Notice of Allegations, as required by Section 170 (2) of the Constitution: and
- (iii) That the allegations contained in the said Notice were not investigated by the Respondents within seven days as stipulated by section 170 (5) of the Constitution.

Besides, the Plaintiff emphasized that:

“the respondents not being persons empowered to exercise the judicial power of the Federation would be acting ultra- vires the Constitution if it sets out to investigate and determine allegation as to whether or not provisions of the law and Constitution have been breached, matters which are the exclusively reserved for the courts by Section 6 of the Constitution.”

While the Kaduna High Court was being flooded with these suits the Acting Deputy Solicitor- General filed an Application at the Kaduna High Court on May 1981 asking for leave of the Court to prefer criminal charges in accordance with Section 185 (b) of the Criminal Procedure Code against some members of the Kaduna State House of Assembly. *The State v. Alhaji Dauda Mani and 68 Ors*,²⁸ the Acting Deputy Solicitor-General Charged:

28. In suit No. KDH/ 29m/ 81

1. that Dauda Mani and 68 other members of the Kaduna State House of Assembly) on or about May 7, 1981 at Kaduna agreed to do an illegal act, to wit, fraudulently making a document titled "Notice Under Section 170 (2) of the constitution of the Federal Republic of Nigeria, 1979" which was served on the Governor of Kaduna State by the Speaker of the House of Assembly of Kaduna state on May 7, 1981 and thereby committed an offence punishable under section 97 (1) of the Penal Code;
2. that Dauda Mani and 61 others (all members of the Kaduna State House of Assembly) formed a common intention to commit the offence of forgery in and Six others on a document titled "Notice Under...." and thereby committed an offence punishable under section 364 of the Penal Code;
3. that Alhaj Suleman and six others on or about May 7, 1981 abetted the commission of forgery by Dauda Mani and 61 others and thereby committed an offence punishable under section 85 of the penal code;
4. that Dauda Mani on or about May 7, 1981, used as genuine a document titled "Notice Under.." which you then had reason to believe to be forged document and thereby committed an offence punishable under Section 366 of the Penal Code.
5. that Dauda Mani and 61 Others on or about May 7, 1981, used as genuine a document titled "Notice Under.....," which you then had reason to believe to be a forged document and thereby committed an offence punishable under Section 366 of the Penal Code;
6. that Dauda Mani and 61 others, on or about May 21, 1981 held in your possession a document titled "Notice Under...," knowing it to be forged and knowing that it would be used fraudulently as genuine document and thereby committed an offence punishable under Section 368 of the Penal Code.

Whilst all these were going on, the Speaker of the Kaduna State House of Assembly spoke of an alternative to the impeachment of Governor Balarabe Musa who he said and maintained would agree to "abide by the provisions of the Constitution and the laws validly made by the House of Assembly".

Shortly before the Investigations Committee began public sitting on June 10, 1981, the competence of four members of the seven-member Committee was challenged in four sworn-affidavits at the Kaduna High Court, and four days later, the impartiality of another panelist was also impugned in a sworn-affidavit. The Constitution requires that members, appointed to investigate allegations of "gross misconduct" against the holder of the office of Governor/Deputy Governor, in the opinion of the Speaker:

"...are of high integrity, not being members of any public service, legislative house or political party."

In spite of claims which seriously cast grave aspersions on the competence and integrity of four members of the Investigations Committee since those who made these claims were certainly aware of the consequences under the law of swearing to false affidavits; and, in spite of two motions at the Kaduna High Court, particularly the *ex parte* motion which raised a fundamental point of law, the Investigations Committee began its public sitting on June 10, 1981.

The Investigations Committee began sitting with some serious problems. First, all its members (except Alhaji Ahmadu Broomassie) were sworn in by the Clerk of the House rather than the Speaker of the House. Second, Mr. G.O.K. Ajayi told the Committee that Governor Balarabe Musa would not appear before it because the composition and proceedings of the Kaduna State House of Assembly raised fundamental questions of law. Third, a Kaduna High Court presided over by Justice Chigbue

granted Governor Musa Leave to file an application for an *Order of Prohibition* prohibiting the Investigation Committee from investigating allegations of "gross misconduct" against Governor Musa pending the final determination of the substantive suit, and adjourned sitting until June 23, 1981.

Because public offices were directed by the Secretary to the State Government to obtain clearance from the Office of the Governor before they can give evidence before the Investigations Committee, few very witnesses gave evidence before the Committee. The first witness was the Sergeant-At-Arms to the House of Assembly. He told the Committee that he accompanied the Clerk of the House to serve the Governor an envelope containing some documents, adding that the Governor on opening the envelope refused to sign for it, saying that he would need to consult his lawyers. The Director of Audit, who gave evidence after the Sergeant-At-Arms, told the Committee that he was summarily removed from office by Governor Balarabe Musa but was reinstated following a court ruling invalidating the action of the Governor. From the evidence given by the Clerk of the House, the Committee learnt:

1. that the Speaker of the House asked Governor Musa to reject the Lagos decision of party-leaders on the salaries of public officers;
2. that Governor Musa appointed Alhaji Abdul Yazid as the Head of Service and Secretary to the State Governor contrary to the provisions of the Constitution; and that Alhaji Yazid's appointment was nullified following a court action instituted by a member of the Kaduna State House of Assembly; and
3. that all the companies proposed by the Kaduna State Government, according to a letter from the Federal Ministry of Commerce, were duly registered;

But two of the Clerks depositions were *controverted* by two witnesses: the first testified to the effect that all the companies proposed by the Kaduna State Government were not registered at the Federal Ministry of Commerce. In a sworn-affidavit, Mallam Rabi Saidu (Administrative Manager of the Kaduna State Broadcasting Corporation) and a lawyer by profession, claimed that the case purported to have been filed challenging the appointment of Alhaji Abdul Yazid as the Head of Service and Secretary to the State Government was struck out by Mr. Justice Chigbue on March 17, 1981 for want of prosecution by the complainant.

It would appear that the Committee did not take its assignment seriously. The Committee began its public sitting on June 10 (Wednesday) with only six members. On June 12, 1981 (Friday) the Committee held its proceedings with five members; on June 15 and 16 (Monday and Tuesday) another member was absent; Alhaji Ahmadu Coomassie was sworn in on June 15, 1981 having been absent on June 10, 11 and 12, 1981. On June 18th, 1981 (Thursday). The Committee ended its proceedings, thus sitting for only seven days Alhaji Ahmadu Coomassie confirmed the claims made before the Kaduna High Court that he was not a Nigerian but denied being a politician, while Alhaji Yusuf N. Umar, in a sworn-affidavit, claimed that Reverend H.O. Mohammed cannot be regarded as a neutral person, and in fact, would be biased in his handling of his assignment as the Chairman of the Investigations Committee. First, Reverend Mohammed, according to Alhaji Yusuf, was the Chairman of the Federal Government-owned Nigerian Reinsurance Corporation. Second, and more significant, that his daughter, Mrs H. Codjoe, was the Counsel to the Kaduna State House of Assembly.

The Politics of the Impeachment of Governor Balarabe Musa

Let us now examine the role of the Kaduna High Court and the Federal Court of Appeal. It seems to us that four issues are before the Courts.

The politics of the Balarabe Musa's Impeachment has been located by Akinsanya²⁹ in the manner of his ascendance to power and the intrigues which followed. The results of the gubernatorial elections held on July 28, 1979 in Kaduna State showed Alhaji Abdulkadir Balarabe Musa, representing the Peoples Redemption Party (PRP), defeated Alhaji Lawal Kaita, representing the National Party of Nigeria (NPN): The results were as follows:

Alhaji Balarabe Musa:	560,605 (45.13%)
Alhaji Lawal Akita:	551,252 (44.38%).

In an election petition filed against *Alhaji Balarabe Musa and Two Ors*, Alhaji Lawal Kaita (petitioner) claimed that he ought to be returned at the election as he had secured a majority of the votes cast at the election:

Alhaji Balarabe Musa:	560,605
Alhaji Lawal Kaita:	561,256

Dismissing the petition argued by Alhaji Abubakar Dan Musa (later the Speaker of the Kaduna State House of Assembly), the three-member Election Tribunal, presided over by Justice J.A Adefarasin ruled that "the petitioner did not score the majority of votes at the Governorship elections and his petition must fail".

While the PRP won the gubernatorial election in Kaduna State, thanks to the last minute electoral strategy of the UPN, the results of the House of Assembly elections in the State created a dilemma for the PRP in that the NPN won almost two-thirds of the seats in the Assembly: The results were as follows:

29. See Akinsanya and Oretuyi "Impeachment of Governor Abdulkadir Balarabe Musa of Kaduna State" in Akinsanya and Idang (eds) *Nigeria Government and Politics (1979 - 1983)* (Wusen Publishers, Calabar 2002) pp. 214-215.

Great Nigeria Peoples Party (GNPP):	10(10.10%)
National Party of Nigeria (NPN):	64(64.64%)
Nigerian Peoples' Party (NPP):	6(0.6.06%)
Unity Party of Nigeria (UPN):	3 (3.03%)
Peoples' Redemption Party	16(16.16%)

Because the PRP, in terms of membership, leadership, organization and programmes was an extension of the Northern Elements progressive Union (NEPU), opposed to the Northern Peoples' Congress (NPC), which represented the interests of the Northern aristocracy during the First republic, Governor Balarabe Musa found himself engaged in a bitter conflict with the NPN which was seen, indeed, regarded as the successor to the NPC.

Thus, the conflict between Governor Musa and the NPN – dominated Kaduna State House of Assembly which later culminated in the impeachment of Governor Musa had historical antecedents and ideological dimensions, Governor Balarabe Musa:³⁰

“The realities of Nigerian politics today are that the roles and place of the NPC of yester-years have been largely taken over by the National Party of Nigeria (NPN), just as those of the NEPU, have been largely taken over by the PRP. The harsh repression in the form of detentions, imprisonment, torture, murders and confiscations, meted by the NPC on the members of the NEPU are still fresh in the memory of many members of the PRP. The postures, the threats, molestations, and general conduct of NPN leaders and members, before, during and after the last elections and since, have done nothing to mitigate this. As a matter of fact, the intimidations (economic, social and legal) which characterized the conduct of the

last elections and which were perpetrated largely by the NPN and its agents, both inside and outside the government clearly establish this linkage between the NPC and NPN.”

That Governor Balarabe Musa and the NPN-dominated House of Assembly were on a collision – course which might eventually lead the latter to have recourse to Section 170 of the Constitution to remove the former from office was, therefore, quite clear from the beginning of elective politics in the Second Republic. First, the PRP had captured not only the heart of the power base of the Northern aristocracy, namely, Kaduna; it had also captured Kano, the commercial base which supported and sustained the power base of the Northern aristocracy. Second, the political objectives and policies of the governments of Kaduna and Kano States served, as Governor Abubakar Rimi of Kano State³¹ put it, “as a vanguard for revolutionary transformation of the decadent social order promoted and upheld by the NPN.” Third, the abolition of community and cattle taxes in Kano and Kaduna States was a rude shock to the “corrupt feudalistic traditional order.”

It was therefore, not surprising that the House of Assembly, on four occasions, rejected the lists of Commissioners sent to it for approval by Governor Balarabe Musa while he, in turn, refused to bargain and negotiate with the House.

The removal of the Governor Balarabe Musa through impeachment was to create something of an impeachment fever throughout the country. As Nwabueze³² has observed, it suddenly awakened in the Legislative Houses a realization of their power over the seemingly almighty chief executives, and a desire to demonstrate it. Thus, within one year of the Kaduna episode, threats of impeachment were made against seven state Governors

31. *Ibid.*

32. Nwabueze B.O: *Presidentialism in Nigeria* Nigeria National Merit Award Lectures Volume 1 (Longman Nigeria Ltd.) p. 23.

– those of Niger, Rivers, Cross River, Gongola, Bendel, Lagos and Kwara, and four Deputy Governors – those of Plateau, Kano, Rivers and Cross River. Impeachment was actually commenced against the Governors in Rivers and Cross River States and the Deputy Governors in Rivers, Cross River and Kano States. It failed in all but one case, that of the Deputy Governor of Kano States.

The Impeachment of Alhaji Ibrahim Bibi Farouk, Deputy Governor Kano State

Several allegations of gross misconduct were made by 104 of the 136 members of the Kano State House of Assembly against Alhaji Bibi Farouk.

It would appear that Kano impeachment exercise, did not involve gross violation of the Constitution as such. The impeachment had more of political undertones. It obviously arose out of the spilt in the People's Redemption Party as a result of which the Governor and the Deputy Governor were in different factions. A possible way out of the strained political relationship between the Governor and the Deputy Governor was for the Deputy Governor to have resigned at that point in time. That they cannot work together was clear from all indications. The Committee commented on the anomalous position of the Deputy Governor thus:

“The Deputy Governor admitted that the relationship between him and the Governor of the State degenerated to the lowest ebb. It came to a stage when none of the Government ministries was dealing with him. He stopped attending the Executive Council Meetings of the State in November 1980. Several letters were tendered to show his protestation for allegedly being shut out. We have in evidence exhibits which also show that

the Deputy Governor was opposed to the policy of the Kano State Government."³³

Continuing, the committee stated:

"We cannot understand how the Deputy Governor can justify his continued membership of the Government of Kano State, while he at the same time behaves as an agent of some other Government that appears hostile to the Kano State Government. We are convinced by his own admission before us and by the tone of letters he wrote that he has made himself *person non grata* and he is not entitled to participate in the government he so openly derides. We have come to the conclusion from the perusal of all documents emanating from the Deputy Governor that he regards himself as a government within a Government....the stance of Deputy Governor offends against the accepted principle of collective responsibility in all civilized democratic Governments the world over.

We think the most honourable thing for the Deputy Governor to have done was to have resigned from office and pitch his camp squarely against the present Government of Kano State."³⁴

The Committee went further:

"The question before us is not whether the Government of Kano State is right or wrong with regards to its policy towards the Federal Government on the issue of P.L.O. What is clear is that the Deputy Governor has adopted a stance of active opposition to a Government of which he

33. See Akinsanya and Oretuyi *op.cit* 29 - 31.

34. *Ibid*

is a member. He cannot claim justification for such an attitude as long as he remains part of that Government.

We have documents tendered in evidence pointing to the Deputy Governor's dissatisfaction with the schedule of duties and the various steps he took which resulted in various Government agencies ceasing to deal with him..... He threatens...he abuses sometimes; breaks civil service rules by arbitrary appointments of people who have rightly been regarded as agents into the service of the Government...

We find the conduct of the Deputy Governor grossly unbecoming in several respects. We are alarmed to notice to what depth discipline has degenerated in the civil service of the State as a result of the Deputy Governor's hostility to his Governor."³⁵

The Committee concluded that:

"The Deputy Governor has misconstrued his constitutional position or how else can one explain his attitude to the Governor in all the Exhibits written by him or emanating from his office. He thinks that he and the Governor are equal... Whereas ... the Constitution vests the exercise of the executive powers of the state solely in the Governor and not jointly with the Deputy Governor. This misguided concept of his place in the Government provided the explanation for his acts of gross- misconduct. There cannot be two Governments in a state."³⁶

■5. *Ibid.*

■6. *Ibid.*

The committee found the Deputy Governor guilty of the allegations in Articles 1,2,3,4, and 5 of the impeachment articles. The report of the investigating committee was adopted by the state House of assembly by 104 votes.

Impeachment in the Fourth Republic

The President Obasanjo Impeachment Saga, 2002

Under the present dispensation, President Olusegun Obasanjo has been threatened with impeachment on two occasions. On the first occasion in 2002, the Notice of allegation of gross misconduct contained thirty-two allegations, which included alleged breaches of the constitutional provisions in respect of the following: withdrawal of money from the Consolidated Revenue fund or any other public fund of the federation;³⁷ the "Federation Account" and regarding the system of revenue allocation.³⁸ Specifically, the President was accused of arbitrary amendment of the capital provisions of the 2002 Appropriation Act without the legislative approval of the National Assembly. He also issued an Executive Order which constituted an amendment of the Revenue Allocation Act. He allegedly engaged in extra-budgetary expenses by spending N9.5 billion instead of N5.9 billion approved for a project, and spent N3 billion on 63 ministerial houses with furnishing without a budgetary approval for it in the year 2000. There were also allegations of various "unlawful" withdrawals from the Federation Account without National Assembly approval. On one occasion he allegedly withdrew N16 billion to purchase \$40 million dollars. On another, he "withdrew" \$185 million dollars without authority from the National Assembly.

The President also allegedly showed lack of transparency and accountability by not disclosing the exchange rate for the sum of N166 billion which brought in \$40 million dollars.

37. Section 80(4) of the Constitution of the Federal Republic of Nigeria 1999.

38. Section 313 *ibid*

Other allegations were that he refused or neglected to pay the 13 per cent revenue derivation to the benefiting states; that he made N82 million available to Ghana for the use of the country's Police; that he intentionally refused to pay the sum of \$229 million into the Federation Account and that he paid N362 million as legal fees to Akin Delano, Legal Practitioners, without appropriation by the National Assembly. The money was allegedly taken from the Loot-Recovery Account. Another payment in the sum of ₦1.5 million was allegedly made from the Loot-Recovery Account as legal fees to Akin Delano. There were other payments allegedly made from the Federation Account without any legislative approval from the National Assembly.

There can be little doubt that the foregoing allegations, if proved, would have amounted to the conduct of government without transparency and accountability. There are, however, some commentators who believed that the move to impeach the President was politically motivated. Onagoruwa³⁹ for instance, opined that the anger against the President, a Southerner, "was primarily from the North". After referring to an alleged secret agreement to let the presidency to the southerners, particularly to the Yorubas, in 1999 he concluded:

"In spite of all that documentary ritual, the Northern leadership is still not satisfied. They indulged in all forms of political acrobatics to upset the Obasanjo government. They adopted the Sharia a religion that is contrary (sic) to the constitution, and endeavoured all other political stratagems to discomfit the government. Their ace card now is impeachment because Obasanjo has to go in spite of all the unconstitutional concessions

39. See Onagoruwa Olu "The Obasanjo Impeachment Saga: where are the Impeachable Offences." *In Law and Contemporary Nigeria: Reflections* (Inspired Communication Ltd, Lagos). 2004. p.325.

granted to them by Obasanjo. Obasanjo has to go because they chose him in the first place."⁴⁰

It is not easy to establish the veracity of Dr. Onagoruwa's claims. But one can hazard the view that at the time the impeachment move was initiated not, a few people believed that the President was only a victim of his firm resolve not to gratify the financial demands of members of the National Assembly.

The Impeachment of Chief D.S.P Alamiyeseigha, Governor of Bayelsa State

The Governor was served with a notice of impeachment containing allegations apparently put together by the Economic and Financial Crimes Commission (EFCC) which had earlier invited the legislators to its office in Lagos from where the Notice was reportedly signed.

Governor Alamiyeseigha had been arrested in London and remanded in custody on allegation of money laundering. He was released on bail but his movement was restricted in London. He was reported to have jumped bail and returned to Nigeria.

The Investigation Panel headed by Chief David Serena Dokubo Spiff submitted an interim report. The panel held fundamentally that the act of jumping bail by the Governor in London, where he was standing trial on allegations of money laundering amounted to "gross misconduct." The impeachment was carried out by 17 of the 24 members of the State House of Assembly.

The removal of Governor Alamiyeseigha has not been free from disputation. The impeachment was apparently spurred by the EFCC. But in the words of an informed commentator, Ajayi Olatunji Olowo.⁴¹

40. *Ibid* at 321.

41. *In This Day*, of October 22, 2006 p. 108.

“While the EFCC induced impeachment against alleged corrupt governors might be a cause for political victory for the governed, the scenario is a breach of the fundamental principle of federalism in a presidential system of government with supremacy of the constitution and if the trend is not handled cautiously it could lead to a subversion of the democratic process.”

Continuing, Olowo said:

“The current gale of impeachment sweeping across the country (while good enough to bring erring governors to book) is seen in some quarters as made possible by the monopoly of security apparatus by the Federal Government deployed to exert pressure on the law-makers, thus the view that the anti-corruption campaign is targeted (rightly or wrongly) at those governors not on the good books of the FGN).”⁴²

But as Olowo quipped:

“Ordinarily the state assemblies and the National Assembly (NASS) need no overt or covert prompting or inducement from outside to initiate impeachment proceeding against the elected officers covered by the immunity clause in Section 308(3) of the 1999 Constitution.”⁴³

The question to which no plausible answer has been found is: if the influence of federal government controlled security apparatus is borne out of a desire to rid the states of corruption (with or without trampling on the principle of federalism) then,

42. *Ibid*

43. *Ibid*.

who facilitates such actions when and where necessary by exerting similar pressure on the NASS?

The Impeachment of Senator Rashidi Adewolu Ladoja, Governor of Oyo State

Senator Ladoja was, on January 12, 2006 removed by 18 out of the 32 members of the Oyo State House of Assembly. This was in spite of the fact that the then speaker of the House, Adeolu Adeleke and two other members of the House had instituted a suit against Ladoja's removal. On the same day (i.e. January 12), an Ibadan High Court, declared Ladoja's removal as null and void on the ground that the setting up of the seven-man investigative Panel by the Acting Chief Judge was illegal because it contravened the court order.

Another suit instituted by some legislators challenging the impeachment process was dismissed for want of jurisdiction. The plaintiffs appealed to the Court of Appeal. In its judgment, the Court of Appeal held that the processes of impeachment as stipulated in the 1999 Constitution were not followed especially in the light of the fact that 18 out of the 32 members did not constitute two-thirds majority as spelt out in the Constitution. The court also faulted the sitting, outside the chambers of the State House of Assembly, of the faction which removed Senator Ladoja to deliberate on a sensitive issue like the impeachment of a sitting governor. The court also considered the propriety or otherwise of carrying out impeachment proceedings by willfully excluding the Speaker or Deputy Speaker of a State House of Assembly who are supposed to play a leading role in such a matter as provided for in section 188 of the Constitution. On this score, the court ruled that no factional meeting of certain members of a State House of Assembly can amount to a constitutional meeting of the whole House as envisaged and provided for in the Constitution. This is especially so as there was no counter-affidavit before the lower court to prove that any member of the House of Assembly of Oyo State was suspended

or that the plaintiffs/appellants were removed as Speaker and Deputy Speaker in accordance with the provisions of the Constitution.

The judgment has been hailed as the "Triumph of Constitutionalism"⁴⁴ and one which has "reaffirmed judiciary's Credibility."⁴⁵ The respondents in the Court of Appeal have, however filed an appeal against it at the Supreme Court of Nigeria.⁴⁶ The refusal to enforce the judgment of the Court of Appeal is a setback for the Rule of Law. We agree with Joseph Otteh, Executive Director of Access to Justice, that:

"The principle that a party who gains title following a judgment is entitled to assume legal rights flowing from that judgment is deeply embedded in Nigeria's jurisprudence. Moreover, the separation of powers doctrine, which undergirds our constitutional democracy, means that the courts retain jurisdiction, even post judgment, to determine circumstances when it would stay the full realization of its judgment, and this power is reserved to the courts. By asking that the Governor of Oyo State Senator Ladoja await the outcome of an appeal the Attorney-General usurps the power and jurisdiction of our courts to determine when and under what conditions its judgments and orders are to be stayed."⁴⁷

The refusal to enforce the judgment has attracted other strident reactions.

A former President of the Nigerian Bar Association Mr. Wole Olanipekun, for example was less sparing when he was

44. *Daily Sun* Editorial, November 3, 2006 pp 1 and 2.

45. *This Day*, November 7, 2000 p. 46.

46. *Saturday Tribune* November 4, 2006.

47. *Daily Independent* November 9, 2006 p.1.

reported to have stated that "if any Minister of the present administration would like to play politics with his position, it should not be that of the Minister of Justice and Attorney-General."⁴⁸

The Impeachment of Mr. Ayo Fayose, Governor of Ekiti State and his Deputy, Mrs Abiodun Olujinmi

The Notice of Allegations against the Governor and his deputy contained the following charges.⁴⁹

- (i) Illegal operation of foreign accounts with the Bank of America, United States of America.
- (ii) Illegal operation of Foreign Accounts Nos. 50633925, 60642924 and 80809594 kept with Barclays Bank Plc.
- (iii) Illegal diversion of Local Government Funds from Ekiti State Joint Local Government Account.
- (iv) Receipt of illegal gift in the sum of Thirty Seven Thousand Pound sterling only.
- (v) Receipt of illegal gift of a house lying and being at 10, Kobiowu Crescent, Iyaganku GRA Ibadan.
- (vi) Receipt of illegal gifts of two house lying and built at 23, Ring Road Restaurant Street Behind Total Petrol Station, Iyaganku GRA, Ibadan and at Aro Road. Afao-Ekiti, Ekiti State.
- (vii) Illegal transfer of the sum of \$100,000 to the United States of America through Account No. 45703770 of Citi Bank.

On the day the Notice of allegations was made public, an aide to the Governor was reported to have accused the EFCC of "coercing" the lawmakers to sign the notice.⁵⁰ Addressing a Press Conference, he alleged that the EFCC operatives "kidnapped the Ekiti lawmakers who were later taken to an

48. *This Day*, November 7, 2006 Back page.

49. *The Nation*, September 30, 2006.

50. *The Nation*, *Ibid* p. 2

unknown destination” where they allegedly signed the impeachment notice under “duress.”

He also *alleged* that the first set of five law-makers arrested had already spent five nights in the custody of the EFCC while the Speaker and the Deputy Speaker were also detained. In his words:

“As a matter of fact, members of the state House of Assembly had been invited for more than six times. The Speaker and the Deputy Speaker have been detained once while the first set of five (House) members arrested spent five nights in the EFCC custody.”

He went further:

“A new twist was, however, added to the matter when upon the invitation of the EFCC all the 36 members of the House of Assembly left for Lagos on Wednesday 27th September 2006, only to be kidnapped by operatives of the EFCC and later taken to unknown destination aside their usual detention camps in Okotie-Eboh and Ikoyi, Lagos. Reports reaching us yesterday morning indicate that the (House) members had been coerced and intimidated to sign a notice of impeachment against the governor at their illegal detention camp obviously under duress in Lagos more than 200 kilometres from Ado-Ekiti, their statutory sitting place. In the process, most of them have been dispirited.”

The Governor’s aide also alleged that the EFCC was “acting out the script” of the opposition politicians in Ekiti State, saying the opposition had become vulnerable to all the “intimidating political stature” of Governor Fayose. He described as “appalling and unconstitutional a situation where a body meant to

be anti-graft turns itself into a legislative council overnight” saying the scenario portends “an invitation to anarchy.” He concluded that while the Ekiti State Government identified with the anti-graft policy of the Federal Government, the Fayose administration abhorred a situation where the EFCC has turned to a “political tool of the enemies of this government.”

The Chief Judge of the State was requested to empanel a team to investigate the allegations and report to the State House of Assembly. The House was however dissatisfied with the type of people on the Panel. They were seen as “friends” of the Governor and people who will not be “objective.” The Speaker indeed requested the Chief Judge to disband the Panel, and made efforts to stop its inauguration of the Panel by the Chief Judge. When these failed, the State House of Assembly purportedly suspended the Chief Judge and appointed another judge as the Acting Chief Judge, with a directive to the new appointee to constitute another Investigation Panel. The Panel which was constituted by the “suspended” Chief Judge cleared the Governor and his deputy of the allegations of gross misconduct.⁵¹

The Panel constituted by the “Acting Chief Judge” however, pronounced the Governor available, whereupon he and the deputy were removed from their offices. But as President Obasanjo stated, in his National Broadcast on the imposition of a state of emergency in Ekiti State, “as a result of the starting base of the impeachment process in Ekiti State being unconstitutional, there is no base for the edifice to stand, something cannot stand on nothing,”⁵² The upshot was a situation in which the Deputy Governor claimed to remain the constitutional Deputy Governor and the Acting Governor in the absence of Governor Ayo Fayose, while at the same time, Mr. Ayo Fayose claimed “in hiding” to be Governor and the Speaker who was sworn-in by

51. *Daily Sun* October 13, 2006 p. 1.

52. *This Day* Friday, October 20, 2006 p. 69

the "Acting Chief Judge," as the Acting Governor was also functioning in that capacity.

As the President further stated "The action of the Speaker in spear-heading serial unconstitutionality for him to be the beneficiary at the end of it all is odious and leaves much to be desired and could not have been in contemplation by the makers of our constitution. Impeachment is a very serious and sacred duty and responsibility of law makers which should not be undertaken lightly or for personal aggrandizement."⁵³

The Impeachment of Mr. Peter Obi, Governor of Anambra State

On Monday, October 16, 2006, the Anambra State House of Assembly served impeachment notice on the State Governor, Mr. Peter Obi, and his deputy, Mrs Virgy Etiaba. The impeachment resolution, which was passed by 13 members of the House of Assembly whose signatures appeared on the impeachment notice, showed that the impeachment was as a result of alleged gross misconduct.⁵⁴

The grounds of the impeachment notice were said to be that Mr. Peter Obi and his deputy violated their oaths of office and constitutional obligation not to allow personal interest to influence their official conduct and decision. It was also alleged that the Governor and his deputy corruptly influenced and caused to be placed, huge sums of money belonging to Anambra State Government in the Fidelity Bank Plc, a bank which they have substantial interest and where the governor was the immediate past chairman. The law makers also alleged that the state governor and his deputy put themselves in a position where their personal interests conflicted with their duties and responsibilities contrary to the code of conduct for public officers.⁵⁵ They also

53. *Ibid.*

54. *Nigerian Tribune*, October 17, 2006. p. 4.

55. See the 5th Schedule section 1 of the Constitution of the Federal Republic of Nigeria, 1999.

alleged that Mr. Obi corruptly influenced and caused to be awarded to his kinsman Mr. Anthony Akpulu, contract for the construction of the buildings in the "so-called business village" which cost over N100 million without due process.

Other allegations were that the State Secretariat Complex, awarded at a cost of over N500 billion to Paul Enodom, a business Partner and the Governor's Office-Complex in Awka at a sum exceeding N100 million to the Governor's campaign manager and associate, Mr. I.K. Nwandu were without due process. The law-makers also accused the Governor of failing to show concern to the victims of the Onitsha crisis as a result of his "shoot-on-sight order."

The Governor, in his immediate reaction to the impeachment notice, was reported to have said: "we have been in the news for wrong reasons and we will not allow Anambra State to go backwards. We shall continue to make Anambra State better".⁵⁶ Continuing, he said: "I tell you, if I have taken one Kobo of Anambra State, I will resign and go home, but I know no Kobo is missing."

In a swift reaction, the national secretariat of the Peoples Democratic Party (PDP) "overruled" the Anambra State House of Assembly whose 18 members served the impeachment notice. In a Press Statement signed by the National Secretary of the Party, Chief Ojo Maduekwe, the Party directed the House, dominated by its members, to reverse their action immediately or face sanctions from the national secretariat of the party. The statement described the actions of the lawmakers as not only embarrassing to the Party, but as well as the President who was just back from an official visit to the State.⁵⁷

The House however defied the party's order, proceeded with the impeachment move and directed the State Chief Judge to constitute an Investigation Panel; which the latter did. Meanwhile, 13 members of the House disagreed with the rest,

56. *Nigerian Tribune op. cit.*

57. *Ibid.*

convened a meeting of the House, and directed the Chief Judge not to take further action on the earlier resolution to investigate the Governor and his deputy. The earlier resolution and the entire proceedings relating to the impeachment were “expunged” from the House records.

The Chief Judge, however, proceeded to swear in the members of the Investigation Panel. The House has since impeached the Governor, and he has been replaced by his deputy, Mrs Etiaba.

Meanwhile, the 13 members of the House who disagreed with the rest had instituted an action in the High Court of Anambra State (suit No. A/332/06 & A/89/M/06) by way of originating summons, in which they are seeking the determination of the following questions!

1. Whether or not by virtue of Section 188(3) and (4) CFRN 1999, the act of the Defendants in relation to the passing of a motion that the so-called allegations against the Governor of Anambra State, Mr. Peter Obi, be investigated is constitutional when it was not supported by votes of two-thirds majority of the entire members of the 16th Defendant.
2. Whether or not the non-compliance with Section 188(4) aforesaid does not invalidate the purported Resolution requesting the Chief Judge of Anambra State, to appoint a Panel of Seven Persons to investigate the allegations against the Governor, Mr. Peter Obi.
3. Whether in view of section 188(7)(a) CFRN 1999, the Defendants can validly act on a purported report of an impeachment Panel of Investigation for which the Defendants did not make any rules of procedure.
4. Whether or not the division of the 16th Defendant into two factions made up of the plaintiffs on one hand and the 1st to 15th defendants on the other did not vitiate the entire proceedings of the 16th Defendant as the 16th

Defendant was no validly constituted in the circumstance to remove the Governor of Anambra State from office.

5. Whether the exclusion of the Plaintiffs from the meeting where the purported removal of the Governor by the Defendants at 5.30 a.m. was carried out is valid in view of the Standing Rules of the 16th Defendant, and in view of the fact that the defendants did not receive any report whatsoever the Panel of Investigation.
6. Where or not by virtue of Section 188(9) CFRN 1999, the act of the defendants in relation to the passing of a motion that the so-called report of the Investigation Panel that indicted the Governor of Anambra State, Mr. Peter Obi, and his removal from office as governor thereof is constitutional, when the motion and resolution were not supported by votes of two-thirds majority of the entire members of the 16th Defendant.

The Plaintiffs are seeking the following reliefs:

1. *A Declaration* that by virtue of *Section 188(3) and (4) CFRN 1999*, the act of the Defendants in relation to the passing of a motion that the so-called allegations against the Governor of Anambra State, Mr. Peter Obi, be investigated is unconstitutional not being supported by votes of two-thirds majority of the entire members of the 16th Defendant.
2. *A Declaration* that non-compliance with *Section 188(4)* aforesaid renders unconstitutional and invalidates the purported Resolution requesting the Chief Judge of Anambra State to appoint a Panel of Seven Persons to investigate the allegations against the Governor, Mr Peter Obi.

3. *A Declaration* that in view of *Section 188(7)(a) CFRN 1999*, the Defendants cannot validly act on a purported report of an Impeachment Panel of Investigation for which the defendants did not make any rules of procedure.
4. *A Declaration* that the division of the 16th Defendant into two factions made up of the Plaintiffs on one hand and the 1st to 15th Defendants on the other vitiates and rendered ineffectual the entire proceedings of the 16th Defendants as the 16th Defendant was not validly constituted in the circumstance to remove the Governor of Anambra State from office.
5. *A Declaration* that the exclusion of the Plaintiffs from the meeting where the purported removal of the Governor by the Defendants at 5.30a.m. was carried out is invalid, null and void in view of the Standing Rules of the 16th Defendant, and in view of the fact that the Defendants did not receive any report whatsoever from the Panel of Investigation.
6. *A Declaration* that by the virtue of *Section 188(9) CFRN 1999*, the act of the Defendants in relation to the passing of a motion that the so-called report of Investigation Panel that indicted the Governor of Anambra State, Mr. Peter Obi, and his removal from office as governor thereof is unconstitutional, null and void.

The Impeachment of Chief Joshua Dariye, Governor of Plateau State

On Monday, November 14 2006, Chief Dariye, Governor of Plateau State was impeached by a "six-man" House of Assembly. The Deputy Governor, Chief Michael Botmang, was promptly sworn in the replace him. His Oath of Office was administered by the Acting Chief Judge, Justice Lazarus Dakyen, who had earlier been removed from that office by the ousted

Governor.⁵⁸ The Governor's removal followed an interim report of the seven-man Panel set up by Justice Dakyen to investigate allegations of gross misconduct against the Governor. The allegations against Chief Dariye relate to money laundering, false declaration of assets, jumping bail in London, misappropriation of public funds and misapplication of ecological funds. The interim report submitted to the House by the Panel was however only based on jumping of bail by Dariye which led to his impeachment as the house believed that the allegation had been proved.⁵⁹ It is note worthy that before the removal of Chief Dariye from office considerable time and energy had been expended on the status of 14 members of the House who decamped from the Peoples Democratic Party (PDP) on whose platform they were elected into office, to another party. While the Independent National Electoral Commission (INEC) declared their seats vacant on account of their defection, the 14 legislators insisted that they were still members of the state legislature. The issue therefore raised questions about quorum and what the real membership of the House was. The controversy has still not been resolved.

But the fact remains that the Plateau State House of Assembly is composed of 24 members and quorum can only be formed by one-third of the total membership. This is regardless of whether any member has lost his seat for whatever reason. The House Standing Rules require that the House shall only seat with a minimum of one-third of the total membership. Once this requirement is no met the House loses the right or authority to sit.

Apparently, the legislators who "sat" and "impeached" the Governor had the backing of the law enforcement agencies. The six legislators sat under the cover and protection of the police.

58. *The Nation* November, 14, 2006 p.1.

59. *The Guardian*; November 20, 2006 p.7.

The police were reportedly also under instruction to arrest the Governor as soon as the legislators pronounced him guilty.⁶⁰

A few days before the impeachment, the Governor had removed Justice Dakyen as the Acting Chief Judge of the State and appointed another Judge in his place. The latter disbanded the seven-man Investigation Panel. But the Panel defied the disbandment order and went ahead with the investigation, even in defiance of a subsisting court order restraining it from continuing to sit. As it transpired, the judge who had been removed as Acting Chief Judge was directed by the House to swear in the Deputy Governor as the new Governor.

General Comments

It is, at this juncture, pertinent to state that the power of impeachment is not meant to give to the legislature control over the tenure of the President/Governor or the administration of the government. As it has been aptly stated, impeachment is not “an inquest of office, a political process for turning out a President whom a majority of the House and two-thirds of the Senate simply cannot abide. It is certainly not, nor was it ever intended to be, an extra-ordinary device for registering a vote of no confidence”.⁶¹ If it were, then it would upset the balance of the scheme of government under the constitution, and destroy the independence of the executive, replacing it with the principle of executive responsibility to the legislature which characterizes the parliamentary executive of the westminster type.

Besides, the provision that “no proceedings or determination of the Panel or of the National Assembly or any matter relating to such proceeding or determination shall be entertained or questioned in any court” which occurs in s. 143 (10) of the Constitution on the removal of the President/Vice President and the equivalent provision in section 188(10) thereof in respect of a

60. *Sunday Sun*, November 19, 2006 p. 6.

61. See Nwabueze, B.O: *The Presidential Constitution of Nigeria* (C.Hurst & Co. London/Nwamife Publisher. 1982. p. 142.

state Governor/Deputy Governor must be taken to refer to a determination which the Assembly has power to make. The Assembly, for instance, has no power to regard as a misconduct what is clearly not so in law as declared by the Federal Court of Appeal in *Anyah v. Attorney-General, Borno State and Anor*.⁶² The Appeal Court, relying on *Blacks Law Dictionary* had pronounced that a misconduct is “an unlawful behaviour by a public officer in relation to the duties of his office, willful in character or acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act.”

It would also appear that the Assembly has no power to determine whether the President or Governor is guilty of a contravention of the code of conduct. This is a matter exclusively for the Code of Conduct Bureau and the Code of Conduct Tribunal as decided in *Anyah v. Attorney-General of Borno State and Anor*⁶³ and *Ogbuagu v. Ogbuagu*.⁶⁴

We therefore agree with Nwabueze⁶⁵ that it was not within the power of a State House of Assembly to threaten, as did the Lagos State House of Assembly, to remove the Governor during the Second Republic for showing disrespect for it, revoking land allocations made to its members, or undermining their standing and credibility within the party, or, as in Cross River, for querying the basis on which it was proposed to pay N25,000 per annum to each legislator as salary, and allowance for his personal staff. There was nothing unlawful in the action of the Lagos State Governor. The impeachment charges brought against the Governor of Cross River State also disclosed no unlawful or improper behaviour or failure to act in the face of an affirmative duty to act. The thirteen charges brought against the Governor were “either misconceived, false or downright mischievous” and

62. FCA/K/141/82.

63. *Ibid.*

64. (1981) 2 NCLR 685.

65. Nwabueze 1982, *op. cit.* pp. 280-281.

“they related either to acts effected directly by a law enacted by the Assembly itself, such as the dissolution of local government councils in the state, and the abolition of the State Public Service Commission, acts specifically approved by a resolution of the House.”⁶⁶ Other charges related to acts explicitly authorized to the Governor under the Constitution or under existing laws of the State, or to acts of administration or management done within his power as the Chief Executive of the State government. Happily, the House itself on receiving the Governor’s reply realized that there was no basis whatever under the constitution for the impeachment, and voted it down overwhelmingly.

If we accept the view that the Assembly has no power to regard as a misconduct what is clearly not so in law, it follows that any such determination is amenable to judicial control. A decision or step in the impeachment process that contravenes mandatory constitutional provision is also not a determination of the House that can be shielded from Judicial review.

It is therefore heartwarming that the Court of Appeal in the *Ladoja Impeachment* case has shown a disposition towards judicial intervention in the impeachment process, in appropriate circumstances.

The Role of the Judiciary

In the wake of the impeachment of Governor Balarabe Musa of Kaduna State in 1981, Dr. Nnamdi Azikwe, a former President, was reported to have declared that the Judiciary was on trial.⁶⁷ Some people, however, felt that the judiciary was only being made the “sacrificial lamb” of Nigerian politics. As Dr. Akinola Aguda⁶⁸ essayed:

66. *Ibid* at 281.

67. Aguda T.A: *The Judiciary in the Government of Nigeria*, (New Horn Press Ltd, Ibadan) 1983 p. 83.

68. *Ibid*

“The Kaduna State was on fire set by the politicians within and outside the State. After the state had been set ablaze the judiciary was called in aid. It was a fire which we who had and have no interest in party politics feel strongly that needed never to have been kindled, yet it was kindled. Those who set the place ablaze were unable to control the conflagration. They called to the beast of burden – the judiciary; it performed as best as it could but in the process abuses were hurled on it. Attempts were even made to trace the genealogy of some individual judges in order to conclude that those judges were incapable of doing justice because of their lineage. Had the judgments gone the other way, some other individuals would have found, or invented reasons, why it was inevitable for the judges to have been partial. They, all of them, conveniently forgot that an impeachment exercise is a political exercise and that they, the politicians, deliberately removed, or i should say attempted to remove ... the exercise from the realms of judicial intervention.”

Today, the dailies are replete with headlines like: Impeachment “between Questionable Integrity and CT’S discretion”⁶⁹ “Impeachment: Erring Chief Judges Not Fit to Remain in Judiciary.”⁷⁰ “Impeachments: The Judiciary and its Integrity,”⁷¹ “Impeachments: Role of the Police and the Judiciary,”⁷² “Wuru wuru judgment: NBA, Judges Throw Punches.”⁷³

69. *This Day* of October 17, 2006

70. *The Guardian* November 5, 2006 p. 41.

71. *Nigerian Tribune*, October 16, 2006 p.32.

72. *Saturday Tribune*, November 11, 2006 p.20.

73. *Saturday Champion* November 18, 2006 p.1.

As the *Sunday Sun*⁷⁴ puts it "In Plateau state, as was the case in some other States, the Chief Judge was a willing ally of the recalcitrant legislators. A few days before the impeachment, Dariye had sacked Lazarus Dakyen as the (acting) Chief Judge of the State and appointed an acting one. But Dakyen and the six-members (*sic*) house defied the governor and went ahead with the impeachment."

The National Judicial Council needs to step in and investigate the roles of the various judicial officers concerned in the impeachment processes, if the image of the Judiciary is not to be allowed to suffer further.

The Role of the Police

Not a few people are of the view that the police, a security agency which must be neutral, has been partisan in its role in the impeachment processes discussed earlier. When the Governor of Bayelsa State was impeached, it was reported that his security details were promptly withdrawn which facilitated his immediate arrest. In Oyo State, in spite of the alarm raised by Governor Ladoja, the role of the police in the crisis which preceded his impeachment called into question their neutrality. The Governor's office at the State Secretariat was "invaded" by "thugs," and no action was taken against them. The Police also offered protection to the 18 lawmakers who carried out the impeachment of the Governor.

On the other hand, In Ekiti State, the security details of the Deputy Governor Mrs Olujinmi, were not withdrawn, after her impeachment and for two consecutive days she went to her office as "Governor" with her full security details. At the same time, the newly "sworn-in" "Acting Governor" Mr. Aderemi, also operated as Governor. The ground for anarchy was therefore being prepared.

74. *Sunday Sun* of November 19, 2006 (p.6).

Conclusion

The gale of impeachment which has hit the polity in recent times is unsettling in terms of its effect on the democratic process. Impeachment as repeatedly stated is supposed to be a check against gross official misconduct by the President or Governor. It is not supposed to be an "inquest of office" or a "political process for turning out" a President whom a majority of the House and the Senate "simply cannot abide." That is why throughout the history of the American government, it has only twice been called into use, and on the two occasions the attempts failed. The impeachment of President Andrew Johnson in 1868, the first occasion of the use of the power in the United States, has in fact been dismissed as "a disreputable perversion of power for a purely sectional and partisan motive."⁷⁵ The ground of the impeachment was that the President had violated the Tenure of Office Act of 1867, by removing the Secretary of State without the consent of the Senate as was required by the Act. His offence is in fact not covered in the grounds for impeachment as specified in the Constitution, namely, treason, bribery or other high crimes or misdemeanour. At worst, it was an improper exercise of a power which, under the Constitution, belonged to him. The second occasion was the impeachment of President Bill Clinton, which also failed in the Senate. The other occasion when its use was imminent was averted by the resignation of President Richard Nixon following the Watergate Scandal. The failure of the two attempts in the United States underscores the fact that impeachment is not a legislative device of censure against the President's conduct of the government. It is a device for effecting the removal of a President in cases of gross misconduct when he does not resign of his own volition.

The procedure has accordingly been made extremely rigid under the various constitutions where it is in use in order to emphasize the gravity of the matter and to discourage a handful of disaffected members from embarking upon it for frivolous or

75. Nwabuzo 1992, op. cit. at 142.

purely partisan reasons. Unfortunately, it does not appear that the true import of the power of impeachment has been sufficiently internalized in Nigeria, although one must be quick to add that in some of the cases, the allegations against the Governors, if properly established following due process, would have amounted to gross misconduct on their part. But in all the five cases examined earlier on, the processes were flawed. Non-compliance with mandatory procedure is as much a ground for nullification of an act or decision as acting in excess of power. The recurring incidence of deliberate non-compliance with the prescribed mandatory procedure for impeachment, therefore, underscores the need for some judicial intervention.

The role of State Chief Judges who have acted on "resolutions" passed by a handful of legislators (less than the constitutionally prescribed number) also leaves much to be desired. It raises questions as to whether a Chief Judge should first satisfy himself that the resolution is properly and validly passed before he/she takes any step. It certainly could not have been the intention of the Constitution that a Chief Judge would be a "robot" who should act mechanically on the prompting of any number of Law-Makers.

A significant dimension that cannot be ignored was introduced to the discourse by Alhaji Aminu Bello Masari, Speaker of the House of Representatives, when he said the situation in which we have found ourselves was a creation of the State Governors, who had always inhibited the emergence and operation of a quality Parliament in the States, noting that the State Houses of Assembly were built on a weak foundation.⁷⁶ He not only maintained that the State Houses of Assembly, in almost all cases, are under the feet of the Governors but pointed out the danger in this, which is that it has produced very weak Parliaments with the result that at the critical times when the protection of Parliament was needed, they were not able to rise up to the occasion. If, he continued, the Governors had allowed

76. *The Punch* November 21, 2006 p. 7.

the Parliaments to develop in such a way that when a Governor started going against the laws of the land they (Parliaments) will raise the "yellow flag," the Governor will move back on track. But because the Parliament is weak, even when the legislators see evil, they are afraid to say so.

What all these add up to is that we all need to embrace the values of constitutionalism. There is not much evidence to show that we as a people, particularly our rulers, are comfortable with the values of constitutionalism. And unless we allow these values to take root in our polity, our democratic process may come to grief.

RE-ENGINEERING THE STRUCTURE AND CONTROL OF THE NIGERIA POLICE FORCE: CONSTITUTIONAL IMPERATIVES

by

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Introduction

Different Schools of Thought and perspectives exist on the role of the police in a democratic society. While the Consensus-functional social theorists contend that the role of the police in a democratic society is essentially that of enforcement of laws that promote the common interest of the diverse classes and groups to achieve harmony in the society; the social conflict theorists on the other hand, view society as being divided into groups and classes with common interests in some areas and conflicting interests in many fundamental areas. They therefore contend that the Police is not created to serve society or the people, but to serve some parts and some peoples at the expense of others.¹

A cursory view of these perceptions reveals a divergence of public perception of the role of the police from one society to another depending on the nature of the functions performed by the police in the society in question.²

In Nigeria as in many other countries, public perception of the police has been diverse and generally reflective of the roles they have performed over time. In colonial Nigeria, the

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1. Alemika E. & Chukwuma I. (eds) *Police-Community Violence in Nigeria*, Abuja: CLEEN&NHRC, 2000 P. 3.
 2. For instance, in a capitalist society, the general perception is that the police only exists "to protect the property and well being of those who benefit most from an economy based on the extraction of private profit since, the police was established primarily in response to rioting and disorder directed against the oppressive working and living conditions in that society." *Ibid* p. 4.

police was regarded as a “tool of oppression” used by the colonial regime to coerce and subjugate the people. This was not surprising, as the colonial police was used in various expeditions to conquer and capture certain kingdoms that refused to cede power to the British.

At independence, the emergent political rulers inherited a police force that had not changed essentially from an oppressive force. It was therefore, easily used to suppress agitations for separate identity, especially among minority elements. The ruling political parties were also accused of using the police to intimidate opposition parties at the regional and federal levels in the contest for political power, especially during elections and political uprisings.

In the present day Nigeria, if the reports from the media and various human rights bodies are anything to go by, the police have continued in their oppressive ways. The Police have been fingered for various human rights abuses in the country even now that the country is under democratic rule.³

Despite the general perception that the Nigeria Police is repressive and anti-people in its operations, a large segment of society is quick to agree that the police force is indispensable in the preservation of law and order and the maintenance of peace and security in the society.⁴ The police are therefore, a necessary

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3. During the tenure of Mr Tafa Balogun as the Inspector General of Police, the operation slogan of the police was “Operation Fire for Fire” which was literally interpreted by the rank and file of the police as a licence to shoot and kill at sight. This gave rise to the increased spate of extra-judicial killings that was witnessed during his tenure. The present Inspector General of Police, Mr Sunday Ehindero on assumption of duty had to change it to a more appropriate one “To Serve and Protect with Integrity.”
 4. In apparent support for the indispensability of the police in the society, Alemika argues that the repressive role of the police pervades every society characterised by class conflict, underlined by unequal and inequitable economic and power relations and that the role of the police is not limited to repression. To him, the more realistic view is to see the police not only as a repressive but also a service organisation. He explains that the police represses and at the same time serves the public and the priority attached to repressive and service functions varies

evil that must exist in every society whether it is ruled by a totalitarian or democratic regime.

Nigeria's transition from military rule to civil democratic rule in 1999 after many years of repressive military rule has heightened public expectation as to the role the Police ought to play in her burgeoning democracy. Given the federal system of government in operation in the country and her rather unpleasant historical experience, fears have been expressed as to the ability of the police to navigate the delicate and stormy waters of partisan politics in order to avoid becoming 'willing tools' in the hands of politicians and political parties in power, in their bid to harass, intimidate, weaken and silence the opposition.

Although this fear appears to be more real where there is a perceived conflict of interest between the Federal and State governments particularly where such States are not controlled by the same party as the Federal government which also controls the police, our recent history suggests that even where the State is controlled by the same political party as the one at the centre, there is no guarantee that such conflicts will not occur.⁵ There are also indications that conflicts can also occur at state level where the Party in power is determined to use the police to muzzle the opposition in the State.

Furthermore, in her character as a multi-ethnic society with plurality of cultures, Nigeria exhibits a lot of diverse and sometimes disparate interests; be they economic, social or political. It is therefore the legitimate expectation of the people that the police should be able to discharge their duties dispassionately without creating a feeling of alienation, favouritism and antagonism in the various segments of society.

across societies and even governments within a given society. See Alemika E. & Chukwuma I. (eds): *Police-Community Violence in Nigeria*. *op cit* note 1.

Only recently, States controlled by the Peoples Democratic Party (PDP) such as Oyo, Ekiti, Plateau and Anambra had experienced internal conflicts which suggested that the Police Commands in those States were not working in concert with the Political Leadership in those States despite the fact that they belong to the same party that is in control at the federal level.

Another burning issue has been the extent to which State Governors can exert control over the police within their respective jurisdictions in pursuance of their constitutional roles as “Chief Security Officers” of their various States. While there are those who hold the view that this can only be realised through the machinery of “State Police” others fear that such an arrangement is a recipe for chaos and crises in the polity.

As a consequence of these fears and expectations, there have been calls for restructuring of the Police; its decentralization or the creation of “State Police” as a panacea for the aforementioned problems. This is informed by the perceived failures or inadequacies of the police and the negative roles associated with the institution in the past and the present democratic dispensation.

This chapter examines the constitutional role of the Police; how it has performed in the discharge of its mandate and factors that are responsible for its perceived failures and inadequacies. It will also consider whether or not such failures or problems are rooted in the structure of the Police and if so, what the ideal structure for the Police should be. In addressing these issues, the chapter will proffer policy options and recommendations with a view to repositioning the Police to discharge its constitutional responsibility effectively to the satisfaction of all segments of the society and thereby engender public confidence in the institution.

Historical Development of the Nigeria Police

The development of the Nigeria Police Force is well documented as literature on the subject abound.⁶ It is however imperative to

6. See for instance, Tamuno, T : *The Nigerian Police in Modern Nigeria: Origins, Development and Role, (1861-1965)* Ibadan: Ibadan University Press, 1970. Tamuno, T; Bashir, I; Alemika, E and Akano, A, (eds): *Policing Nigeria: Past, Present and Future*, Lagos: Malthouse Press Limited, 1993; Ijabiya, D.: *Police and You*, Abuja: Metro Publishers Limited, 2000; Jemibewon, D.M. *The Nigeria Police in Transition: Issues, Problems and Prospects*. Ibadan: Spectrum Books Limited, 2001 p1. for a detailed examination of the historical development of the Nigeria Police Force.

briefly recall certain events in the evolution of the Police Force that are significant to the ensuing discourse. It is important to note that the Nigeria Police has not always been the homogenous body it is today, as it evolved from different units established in the country by the colonial administration.

The Nigeria Police Force was first established in Lagos, the then Federal Capital of Nigeria over a hundred and thirty years ago, when the British Consul charged with the administration of the Colony of Lagos was granted permission by the Crown to establish a Consular Guard comprising some 30 men in April 1861.⁷ This small body of men metamorphosed in 1863 into what was then known as the "Hausa Guard." By 1879, the Hausa Guard, which comprised mainly of people of Hausa stock was further regularised and by an Ordinance, re-designated the Constabulary of Lagos (Hausa Constabulary) under the Command of an Inspector General of Police (Inspector General of Police). This Force was mainly military in character although the men performed some civil police duties.⁸ By the 1st of January 1896, the Lagos Police Force was created and armed like the Hausa Constabulary under the command of a Commissioner of Police.

While these developments were going on in Lagos and the Western parts of the country, the Oil Rivers Protectorate was declared in 1891 in what has today become the South-South geopolitical zone of the country. An armed constabulary was established in Calabar, the new headquarters of the Protectorate. The area was later proclaimed the Niger Coast Protectorate in 1893 and a constabulary modelled after the Hausa Constabulary

7. The Consul had complained that he had numerous duties assigned to him amongst which was the maintenance of law and order. See The Nigeria Police Website <http://www.nigeriapolice.org> visited 4th November, 2003 at 12.30PM.

8. *Ibid.* According to Jemibewon, D.M. the history of the Nigeria Police Force dates back to the coercive activities of the colonial authorities in the 19th century, for the establishment and sustenance of the spheres of influence over what is today known as modern Nigeria. See Jemibewon D.M.: *The Nigeria Police in Transition: Issues, Problems, and Prospects.* op cit p. 1.

was formed. It was this Constabulary that featured prominently in the British expedition to Benin in 1896.

The Royal Niger Company, which operated in the Northern parts of the country, was granted a Royal Charter in 1886 by the British government. The company proceeded to set up the Royal Niger Constabulary with Headquarters at Lokoja to protect its installations and economic interests along the banks of the River Niger. It was this Constabulary that played an important role in the campaigns against Bida and Ilorin.

By 1900, there was a transfer of administration from the Royal Niger Company to the British Government and the Protectorates of Northern and Southern Nigeria were proclaimed. The Royal Niger Constabulary was then split into the Northern Nigeria Police Force and the Northern Nigeria Regiment.⁹ The Lagos Police Force and part of the Niger Coast Constabulary became the Southern Nigeria Police Force in 1906 while the greater part of the Niger Coast Constabulary formed the Southern Nigeria Regiments.¹⁰ The new Police Force was, in addition to normal police duties, was assigned the responsibility of dealing with internal disturbances and external aggression.

The protectorates of Northern and Southern Nigeria were amalgamated in 1914. However, both Police Forces continued to operate separately until 1st April 1930, when they were merged to form the present Nigeria Police Force under the command of an Inspector General of Police with its Headquarters in Lagos.¹¹ Nigerians assumed the overall leadership of the Police Force in

9. *Ibid.*

10. See Jemibewon. D. M. *Op cit.* pp 4-5.

11. The title of Inspector General of Police was later replaced with Commissioner in 1937 but the original title was reverted to in 1951 after the introduction of the new Constitution. The designation Commissioner was then assigned to the Officers then in charge of the Regions. See the Nigeria Police Force, Website <http://www.Nigeriapolice.org> visited 7/6/05 at 12.30pm.

1964 with the appointment of the Late Louis Orok Edet as the first Indigenous Inspector General.¹²

By May 1967, the structure of the Police Force was changed with the creation of twelve states; twelve States commands headed by Commissioners of Police were created. This number rose to nineteen in 1976 with creation of more states. In 1986, a Zonal Command structure was introduced, each under the operational command of an Assistant Inspector General of Police in conformity with the political structure of the country. Additional commands were later created in 1986, 1991 and 1996 in response to the changing federal structure of the country, bringing to a total number of thirty-seven Police Commands including Abuja and twelve Zonal Commands with the Force Headquarters operating as a Police Command.

Significant Issues Associated with the Evolutionary Process of the Nigeria Police.

The evolution of the Police Force as an institution has not been systematic. It would appear from its history that *ad-hoc* structures were set up at various times in response to the interests and changes in the political structure of the country irrespective of whether such structures were desirable or relevant to the growth of the Police as an institution. This has created myriad of problems for the Police some of which are discussed below.

It has been contended that part of the problems facing the Police Force can be traced to the reluctance on the part of the Colonial administration to set up an elaborate Police Force for the territories for fear of the enormous cost that would be involved and the belief that it could put down any serious threat to its interests with sheer military might. The result of the policy is evident as the fine features that made the Metropolitan Police of the United Kingdom stand out were lacking in Nigeria at

12. Till date, 10 other Nigerians have held office as Inspector General of Police. The incumbent, Mr. Sunday Ehindero was initially appointed in an acting capacity but

independence.¹³ Jemibewon¹⁴ further lends credence to this assertion when he observes that “as a result of the deliberate efforts on the part of a departing administration to put in place a Police Force without a well developed structure and policy goals, the NPF was left to virtually begin from the scratch...” The colonial administration to all intents and purposes did not leave any befitting legacy that could be inherited by the post-colonial police administration.

At independence, about fifty percent of the officers in the Nigeria Police were foreigners, most of who opted for early retirement as they did not want to serve under Nigerians. The Police, which started as a colonial police to serve the interests of colonial masters, was not sufficiently adapted to serve the needs of the administration that emerged after independence.¹⁵ It was therefore expected that the indigenous administration that took over after independence would restructure and reorganise the Police Force to meet the needs of an independent country and its people. This was however not the case, as the administration appeared to be content with the colonial legacy. Consequently, the colonial structure was left largely untouched, with a few cosmetic changes.¹⁶

Apart from the structural problems, the Police Force also inherited a serious image problem, having been set up ‘for purposes of advancing colonial interests.’ The police was largely perceived as an agency set up to intimidate and subjugate the people. This contributed a lot to eroding public trust and confidence in the Force and has unfortunately characterised

13. See Jemibewon, D. M.: *The Nigeria Police in Transition: Issues, Problems and Prospects*. *op cit* p. 8.

14. *Ibid.*

15. *Ibid.*

Citizen/ Police relations till today. In this regard Adisa¹⁷ observes thus:

“Many people thought that from being the enemies of the people the police would become friends of the people as well as the custodians of law and order in society. Regrettably, this has not turned out to be so. Almost four decades after independence, the police is yet to change [its] sic orientation to a people oriented force. Indeed some would argue that the reputation of the colonial police is far better than that of the police we have today...”

The challenge for the Nigerian state is to find ways of breaking away from the problems of the past. This can be achieved through a well-planned and coordinated strategy that takes into cognisance, the past history of the police force as well as its constitutional roles and structure.

Constitutional Role and Powers of the Nigeria Police

In a democratic society, the primacy of the Constitution in regulating the affairs of the state and men cannot be overemphasised. It is the Constitution that vests in the state the authority and power to regulate and prescribe standards of behaviour to be upheld by all citizens within the state as well as the sanctions that would apply in the event of non compliance with its laws. Nigeria being a federal state, there is a division of powers between the Federal Government and the Constituent Units i.e. the States. The implications of this power dynamics is that within constitutionally defined limits, both the central government and those of the component units can make laws.

17. Jimmi Adisa: “A New Nigerian Police Image: Its Role in the Next Millennium” cited in: Alemika E. & Chukwuma I. (eds) *Police-Community Violence in Nigeria*, Abuja: CLEEN&NHRC 2000, p. 25

The Constitution of the Federal Republic of Nigeria (the 1999 Constitution) places the Police and other government security services under the Exclusive Legislative List.¹⁸ This means that only the National Assembly can make laws on matters relating to the Police in Nigeria. In this respect, the Constitution provides that "the Nigeria Police Force shall be organised and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly."¹⁹

By virtue of the saving provisions of the Constitution,²⁰ the Police Act²¹ is the applicable law that regulates the Nigeria Police Force. The implication of the foregoing is that the routine and operational functions of the police are regarded as basically a professional, not a constitutional matter and are, as such, left to the police itself.²²

The Police Act contains elaborate provisions for the organisation, discipline, powers and duties of the Police. It specifically states in section 4 that:

"the Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and due enforcement of all laws and regulations which they are directly charged and shall perform such military duties within or without Nigeria as may be required by them by, or under the authority of, this or any other Act."²³

18. See Item 45 of the Second Schedule to the 1999 Constitution.

19. Section 214(1), (2), (a) of the 1999 Constitution.

20. Section 315, 1999 Constitution.

21. Cap 359, Laws of the Federal Republic of Nigeria (LFN) 1990.

22. See Aguda, O. *Understanding The Nigerian Constitution of 1999*; Lagos, MIJ Professional Publishers Limited, 2000, p. 263.

23. Section 4 Cap 359, LFN, 1990.

Five broad functions can be discerned from the above namely; Crime prevention; Detection and apprehension of offenders; Preservation of law and order; Protection of life and property; Enforcement of all laws and regulations and Military duties. These functions will be discussed briefly in order to ascertain the extent to which the Police Force has performed them within its present structure. This will provide the basis for further appraisal of the Police Force in the discharge of its statutory mandate.

Crime Prevention

It is widely acknowledged that crime prevention is one of the proactive aspects of policing and arguably the most challenging in view of the technological and scientific advancements in society which have heightened criminal activities beyond imaginable limits. This explains why the Criminal Procedure Act (CPA) and the Criminal Procedure Code (CPC) of the Southern and Northern states respectively confer enormous powers on the Police to enable it discharge its statutory obligations.

The crime prevention efforts of the police manifest in the form of beat patrols, anti- robbery patrols, vice squads, road blocks, "stop, detain and search" activities as well as supervision.²⁴ However, views are divided as how crime should be reduced in society. Whilst some focus on the causes of crime; some on the criminal; others focus on the environment in which such crimes occur.²⁵ Whatever the area of focus, it is generally accepted that for the crime prevention strategies to be effective, such strategies must focus on reducing opportunities to commit crime, reducing recruitment of criminals and reducing criminal activity among persistent offenders. This strategy must also

—4. See Frank Lieshman *et al.*, (eds) *Core Issues in Policing*. New York: Longman Publishing, 1996 cited by Jemibewon D. *The Nigeria Police in Transition: Issues, Problems and Prospects*. *op cit.* p. 27.

5. Abba Mohammed, "Human Rights and Policing" Paper presented at the In-House Workshop on the Role of the Police in Combating Crimes organised by Ministry of Police Affairs in 2004. on file.

articulate state policy with private initiatives in the overall crime prevention efforts. This is important in view of the decay which the Police Force suffered alongside other state institutions as a result of military intervention in the governance of the country.

Detection and Apprehension of Offenders

The Nigeria Police Force has the primary responsibility under the Police Act to detect and apprehend offenders. This in effect confers on it the power of investigation of crime as well as arrest of offenders as provided by the CPA and CPC applicable to the Southern and Northern Nigeria respectively. These laws attempt to balance the individual rights and liberties of the citizenry guaranteed by the Constitution against the responsibility of the state to prevent crime and ensure the due observance of law and order. This is important because the discharge of the function of detection and apprehension of offenders may involve the arrest, detention, search or any other general deprivation of liberty of the individual concerned. To prevent arbitrariness, various constitutional and legal safeguards have been provided to ensure that only actions which fall within the legal conditions for such arrest, detention or search etc, are recognised.

The policing responsibility of the Nigeria Police does not only stop at detecting and apprehending criminals but also extends to protecting the rights of individuals or communities as enshrined in the Constitution and other legal instruments. Policing is part of the criminal justice system and indeed a gateway to the system. For the policing function to be effective therefore, other institutions in the criminal justice system, like the courts, the prisons, the legal profession and even social welfare services must play their part.²⁶

Preservation of Law and Order

This is another essential part of policing. Laws are basically made to ensure peace, order and good governance required to

achieve sustainable growth and development. To achieve this objective, due observance of these laws must be ensured. This is an integral part of the crime prevention strategy of the police as the breakdown of law and order is a recipe for anarchy and where anarchy thrives, the highest form of criminality is to be expected.

The challenge facing the Nigeria Police in the maintenance of public peace, law and order include; religious upheavals, intra-ethnic disturbances, student's demonstrations, public unrest as well as industrial and labour disputes.²⁷ It has been established that the Police Force has suffered great losses in men and materials as well as overstraining of capacity in the discharge of this onerous responsibility. The net effect has been failure to maintain law and order in the face of daunting challenges which had in the past led to the invitation of the Armed Forces to assist in the task of maintaining law and order.²⁸ This has aggravated the already poor image of the police known for "excessive use of force and unnecessary killings of defenceless citizens exercising their constitutional right to protest in their bid to maintain law and order."²⁹ The challenge is to ensure that the police force is able to achieve a win-win situation by balancing the need to maintain law and order with the protection of individual rights and liberties.

Protection of Lives and Property

It is generally believed that most crimes apart from crimes of passion the occurrence of which is negligible are motivated by the prospect of material benefits. It is in the process of obtaining such material benefits that lives are lost. To prevent crimes therefore, the lives and property of the citizenry must be

27. Jemibewon. D.M.: *The Nigeria Police in Transition: Issues, Problems and Prospects.* op cit p. 31.

28. The Military has been invited more than five times to help the police quell riots and disturbances. See Jemibewon D. M.: *The Military, Law and Society, Reflections of a General*, Ibadan: Spectrum Books, 1998.

29. See Jemibewon D.M op cit p.31.

safeguarded. The Nigerian Constitution guarantees every citizen the right to life and property.³⁰ The responsibility for ensuring the enjoyment of these rights by the citizenry is placed on the State operating through the Police and on the individual.³¹

Enforcement of Laws and Regulations

This is another important aspect of policing that must be seen in the light of the principles of the rule of law, which prescribe equality of all persons before the law. This reinforces the need to enforce laws and regulations without fear or favour, affection or ill will and irrespective of status. Respect for the law, apart from its legitimacy, is predicated on the extent to which such law is brought to bear on its offenders. The citizenry must be deterred from breaching the provision of the law for fear of sanctions that would apply from their being apprehended and tried.

The problem of the Nigeria Police is the seeming inability to prevent and detect the commission of high profile crimes, especially under the present democratic administration. There have been assassinations and cold blooded murders of highly placed personalities which the Police Force is yet to unravel. The assassinations of Chief Bola Ige, in Oyo State when he was the Attorney General of the Federation and Minister of Justice; Chief Harry Marshall, frontline Politician of the All Nigerian Peoples Party (ANPP) in Abuja; Engineer Funsho Williams, Gubernatorial candidate of the Peoples Democratic Party (PDP) in Lagos and recently, Dr Daramola in Ekiti State are examples of unresolved crimes despite assurances by the Police.

30. Sections 33 and 43 of the 1999 Constitution.

31. Sections 12 and 13 of the CPA provide that private persons and owners of property, their servants or persons authorised by them, can arrest without warrant, persons found committing an indictable offence or an offence involving injury to their property respectively, although sections 14 and 39 of the CPA enjoin such private persons to hand over the arrested person to a police officer without unnecessary delay.

Military Duties

Although, not part of the nation's Armed Forces, historically, the Police Force has been performing military and quasi-military functions. Under the colonial administration, the Police was used in the various expeditions across the country to fight and forcefully subjugate Kingdoms that were opposed to colonial rule. The police force has also been used for various Peace-Keeping initiatives in Africa and the world at large. Reports that follow these missions indicate that the Nigerian contingent is usually voted one of the best behaved and disciplined in the performance of these duties. Despite these commendations, there is a general feeling that the police should be used essentially as a non-coercive force except as a last resort.³²

Powers of the Police

The Police Act has conferred certain powers on the Police Force to enable it perform its duties. These include; power to conduct searches,³³ power to detain and search suspected persons,³⁴ and the power to take finger prints.³⁵ A cursory look at these powers would reveal that they are more connected with the administration of criminal justice than civil justice. In this respect, Ehindero³⁶ observes thus:

“Although the powers and duties of the Police span every sphere of human endeavour, its impact on the administration of criminal justice is to sustain the rule of law by preventing crime

32. See for instance the Report of the Constitution Drafting Committee; Sub-Committee on the Public Services, The Armed Forces and The Police, Federal Ministry of Information, Printing Division, Lagos, Volume II, 1976 where the Sub-Committee in considering the constitutional position of the Police accepted this as one of its fundamental positions.

33. Section 28(1) Police Act Cap 359 LFN 1990.

34. See Section 29 Police Act Cap 359 LFN 1990.

35. See Section 30 Police Act Cap 359 LFN 1990.

36. See Ehindero, S.G.: “Whither the Law on Police Confession” *Justice, Journal of Contemporary Legal Problems*, Vol 2, No5, May, 1999.

wherever possible; detecting the culprit when crimes are committed; convicting the guilty and acquitting the innocent; [sic] dealing adequately and appropriately with those who are guilty and by giving proper effect to the sentence and orders which are imposed.”

Although the Constitution and the Police Act appear to vest in the Police exclusive responsibility for policing the country, the general responsibility for the overall security of the country is, in all real terms, the responsibility of all and sundry. This is more so as the Constitution has imposed certain duties and responsibilities on other state officials such as State Governors, which border on the maintenance of public peace, law and order and security which are the primary responsibility of the Police. This creates potential areas of conflict arising from overlapping jurisdictions, human nature and misconceptions especially between the federal government officials such as the Inspector General of Police, Heads of the various Zonal Commands of the Police Force and State Commissioners of Police on the one hand and State Governors on the other.

While Police officers are not strictly under the control of State Governors, they have to work closely with them, as chief security officers of their various states to achieve success in the overall effort to maintain law and order, peace and security. This calls for a proper command and control structure that allows for all those concerned with the security of the country to work harmoniously. The advent of democratic rule under a federal system has made the need for proper engineering of the command and control structure of the police more imperative.³⁷

37. Under military rule, Governors were the appointees of the President and Commander-in-chief of the Armed Forces of the Federal Republic of Nigeria. This meant that they were subject to the control and dictates of the President as their supreme commander. Under that arrangement, it was indeed unthinkable for conflicts to arise between the Governors and the President. Under the civilian dispensation however there is a clear sphere of authority. The Governors derive

The Structure of the Police Force

The Structure of the Nigeria Police Force is constitutionally provided for in sections 214(2) (a) and 215(2) of the 1999 Constitution. Section 214(2) (a) provides that: "... the Nigeria Police Force shall be organised and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly." Section 215(2) further states that: "the Nigeria Police Force shall be under the command of the Inspector-General of Police and any contingents of the Nigeria Police Force stationed in a state shall; subject to the authority of the Inspector General of Police, be under the command of the Commissioner of Police of that state."

From the foregoing constitutional provisions, three different structures can be identified namely:

- a) the Command Structure
- b) the Administrative Structure and
- c) the Organisational Structure

These structures are patterned to meet the constitutional powers conferred on the Police to enable it perform its role effectively.³⁸ A brief discussion of these structures will be undertaken to engender appreciation of the relationship that exists between the Police and the different tiers of government.

Command Structure

This is simply the authority structure of the Police which is predicated on the regimental nature of the Force. By the combined effect of section 214(2) of the Constitution and section

their powers from the Constitution and the mandate given to them at the polls. They have a say as to how law and order, peace and security should be maintained within their jurisdictions which may not necessarily accord with the strategy sought to be adopted by Police officers who are federal workers within their domain.

See also; The Nigeria Police Force website. <http://www.Nigeriapolice.org>

6 of the Police Act,³⁹ the Police Force is under the operational command of the Inspector General of Police. This means that orders, directives and instructions to perform or carry out the duties of the Police flow from the Inspector General of Police, through the chain of Command, to any Officer positioned to implement such order. Disobedience or failure to carry out such instruction, directive or order, may attract sanctions.⁴⁰

Section 7 of the Police Act provides for the rank of Deputy Inspector General of Police who shall act for the Inspector General of Police in the absence of the latter. Section 5 of the Police Act gives effect to section 215(2) of the Constitution by creating the Office and Rank of the Commissioner of Police who shall control contingents of the Police Force stationed in a state. The Commissioner of Police is subject to the command of the Inspector General of Police or whosoever acts on his behalf. Every other rank of the Police is provided for by section 5 of the Police Act.⁴¹

The command structure of the police is hierarchical in nature. The Inspector General of Police (Inspector General of Police) as the highest ranking police officer is responsible for police officers throughout the country.⁴² Although the Inspector General is at the apex of the police hierarchy, he is an appointee of the President.⁴³ He therefore holds office at the pleasure of the President and is subject to his control or that of a Minister

39. Cap 359, LFN 1990.

40. See The Nigeria Police Force website, <http://www.Nigeriapolice.org>.

41. The Command Structure of the Nigeria Police Force in order of hierarchy as follows: The Inspector General of Police; The Deputy Inspector General of Police, The Assistant. Inspector General of Police; The Commissioner of Police; The Deputy Commissioner of Police; The Assistant Commissioner of Police; the Chief Superintendent of Police; The Superintendent of Police; The Assistant Superintendent of Police; The Inspector of Police; Sergeant Majors; Sergeants Corporals and Constables.

42. See section 215 (2) 1999 Constitution.

43. See section 215(1) (a) 1999 Constitution.

charged with that responsibility.⁴⁴ Section 215(3) of the 1999 Constitution expressly states that:

“The President or such other Minister of the Government of the Federation as he may authorise in that behalf may give to the Inspector General of Police such lawful directions with respect to the maintenance and securing of public safety and public order as he may consider necessary, and the Inspector General of Police shall comply with those directions or cause them to be complied with.”

The State Police Commissioners are also enjoined under section 215(4) of the Constitution to receive lawful directives from State Governors with respect to the maintenance and securing of public safety and public order.

It is important to note that the Constitution provides that the directions which the President and State Governors may give to the Inspector General of the Police and Commissioners of Police respectively, which these officers must comply with, must be “lawful directions.” This is why the proviso to section 215 (4) gives the Commissioner of Police discretion to request the Governor to refer the issue which may have been the subject of a Governor’s directive to the President or appropriate Minister where the Commissioner of Police considers the matter to be sensitive. The sanctity of the directions that may have been given is constitutionally protected as “the question whether any, and if so what, directions have been given under this section cannot be inquired into in any court.”⁴⁵

44. In 1999, the Police Affairs Department hitherto under the Secretary to the Government of the Federation was upgraded to a full fledged Ministry of Police Affairs with a cabinet Minister in charge of the Ministry.

45. Section 215(5) 1999 Constitution.

It would appear that the Federal Structure of the country was not taken into consideration by the framers of the Constitution as section 215 (5) unduly places State Governors under the supervision of the President in matters that may be purely within state jurisdiction or in respect of which the State Governors have more knowledge of the local circumstances thereof. This may be a way of ensuring a check on the use of the police by State Governors. The question that arises as to who exercises a similar check on the use of the police by the President? The difficulty lies in the determination of what will amount to "unlawful directions" by the Inspector General of Police for purposes of deciding whether or not to comply with especially where such directives emanate from the President or the supervising Minister of the police. Can the President for instance, order the Inspector General of Police to arrest and detain a Governor of a State, in view of the constitutional immunities enjoyed by Governors by virtue of section 308 of the 1999 Constitution? How is the Inspector General of Police, who is confronted with such orders, expected to react?

In criticising the present arrangement, a renowned political scientist, Alaba Ogunsanwo has observed that this constitutional arrangement whereby State Governors lack the capacity to give binding instructions to state Commissioners of Police is unsatisfactory. In his view, such a situation, "if true, is a negation of the very expression [in the Constitution] that each State Governor is the Chief Security Officer in his State."⁴⁶

These are some of the grey areas which if not properly defined can be potential sources of conflict in State/Federal relations and the entire polity. The recent experience in Anambra State, where the Governor of the State was abducted from his office by no less a personality than the Assistant Inspector

46. See Ogunsanwo, A.: "The Constitution and National Security" In Ayua, I.A, Guobadia, D.A & Adekunle, A.O(eds) *Issues in the 1999 Constitution*, Lagos, NIALS, 2000 p287 also cited by Aguda, O.: *Understanding The Nigerian Constitution of 1999*, op cit pp 264-265.

General of Police (AIG) in charge of a Zone, further heightens the fears expressed by some State Governors and points to the likely abuse to which Police powers may be deployed by federal authorities if not properly checked or monitored.⁴⁷

This command structure that makes the Police that is established to serve the whole federation, essentially accountable only to the President has raised a lot of issues regarding its independence. It is for instance contended that this structure leaves the police open to political manipulation by the executive arm.⁴⁸

Administrative Structure

The administrative structure is divided into six (6) departments: 'A'-'F' with each department charged with peculiar duties. A Department is charged with Administration; B Department is responsible for Operations; C Department handles Logistics and Supply; D Department is charged with Investigation and Intelligence; E Department is responsible for Training and Command and F Department for Research and Planning. There is also the Office of the Force Secretary which is responsible for appointment and promotion, deployment, records and discipline of superior police officers. The day to day functions and activities of the police are carried out through the activities of all these departments.

47. The Governor of Anambra State, Dr Chris Ngige was abducted from his office by men of the Nigeria Police Force under the command of Assistant Inspector General of Police Ige, for the spurious purpose of securing the safety of the Governor following allegations that he may have resigned from office. The whole country was thrown into confusion with allegations and counter-allegations of the complicity of the Inspector General of Police and the Presidency in the affair. The fact that the very officers that were duty bound to protect the Governor were involved in his abduction heightened public scepticism of the role of the police in the present dispensation and the issue of whether State Governors can rely on the Police Force controlled by the Federal Government to protect their interests especially in the event of a possible conflict of interest between the political leadership in the State and those at the federal level.

48. Human Rights Watch: "Nigeria: Rest in Pieces: XI. Police Reform available at www.hrw.org.ht visited 10/11/2005

The creation of these specialised departments has enabled the Force to deploy its personnel to areas where their skills can best be utilised in the discharge of its mandate. Unlike the command structure, the administrative structure of the police has not attracted negative comments from the generality of the populace. This could be attributable to the fact that it is mainly concerned with the internal workings of the police.

Organisational Structure

As part of the re-organisation carried out to improve the operational efficiency, the Police was further structured in line with the geo-political structure of the country, with provisions for supervisory formations. The organisational structure of the Nigeria Police Force is represented in the following descending order: National Headquarters, Zonal Headquarters, State Command Headquarters, Divisional Police Headquarters, Police Station, Police Post and Village Police Post. It has been contended that this structure, apart from enabling the operational crime fighting capability of the Police to be felt by the populace, it also ensures that the whole weight of the powers and duties of the police are spread on the balance of these structures.⁴⁹

The foregoing notwithstanding, it is instructive to note that the Nigeria Police did not have this structure from inception. Indeed, the structure of the Force has undergone several changes since independence. However, the most significant and far reaching was that of 1986 which was undertaken by the regime of General Abacha Badamasi Babangida. To observers of the workings of the police, this change was informed by the "cumbersome administrative structure of the Force which invariably impacted negatively on its performance, especially in the maintenance of law and order in the country."⁵⁰

See The Nigeria Police Force Website, *op cit*.

Before the 1986 re-organization, the Force had six departments namely; Administration; Operations; Works; Crime Investigation; Prosecution; Intelligence and Research, each headed by an Assistant Inspector General of Police. See Iemihewon, D.M. *op cit* p.96.

The re-organisation in effect decentralised the Force and as expected, it has had its salutary and negative effects on the Force. On the positive side, it reduced the time taken for decisions to be made as matters that were hitherto referred to the Headquarters could by virtue of the re-organisation be handled at the level of the Zonal Headquarters. Second, the operational effectiveness of the Force was enhanced through the creation of a dynamic organisational set-up at all levels for rapid response to law and order situations. Third, the massive promotions that took place as a result of the re-organisation had a salutary effect on staff morale.⁵¹

Despite these advantages, the re-organisation was criticised for the following reasons:

- (a) the creation of jurisdictional overlaps in some aspects of police work;
- (b) the creation of Zonal Headquarters led to diversion of personnel at all levels to administrative duties leading to shortages in staff that would have otherwise been engaged in crime detection and prevention;
- (c) the purge of officers and men that accompanied the exercise resulted in the loss of trained and experienced personnel.⁵²

Although the structure of the Police Force has remained largely the same since the 1986 re-organisation, it is necessary to consider whether the present structure is ideal for the Police. Has the structure increased the operational efficiency of the Force? Has the Police Force become well placed to discharge its constitutional role as a result of the present structure? While it may be difficult in the absence of data to ascertain whether the present structure has increased the operational effectiveness of the police, it is generally perceived to be adequate subject to the

51. *Ibid.*

52. *Ibid.*, p. 105.

need for some fine tuning, for the purposes of policing the country. What is required is the co-ordination and proper funding required to enhance the operational effectiveness and efficiency of the Force.

How well has the Police Force discharged its Statutory Mandate?

The preceding part of the chapter has examined the constitutional roles of the police and the structures that have been put in place to enhance its operational efficiency. This part of the chapter will assess the extent to which the police force has succeeded in discharging the constitutional roles assigned to it. In this respect, we shall focus on the period beginning from May, 1999 when the present Constitution became operative and the country successfully transited from a military regime to civil democratic rule. References may however be made to earlier incidents for purposes of emphasis and to show particular trends.

As a colonial oppressive force, the police force operated quite efficiently in repressing the people through armed police patrols, raids, arrests and detention. The colonial police protected the colonial economy by policing labour through the enforcement of unpopular direct taxation, the raiding of labour camps and violent suppression of strikes. The police also ensured the creation, supply and discipline of the proletariat labour force required by colonial capitalism.⁵³ Thus, when viewed against the objective of setting up the colonial Police, it can be surmised that the colonial police was quite effective in the maintenance of law and order which were essential ingredients for the sustenance of the colonial state.

At independence, the emergent political leadership inherited a Police Force whose orientation was essentially the same. Consequently, rather than see itself as the peoples police, the police continued essentially as a repressive force in the hands of the government of the day. The subsequent absence of

53. See Alemika, E. & Chukwuma, I. *op cit.* note 1 p. 35.

democratic governance on account of prolonged military intervention in the governance of the country did not help matters as the military continued to use the police to repress citizens and civil society groups who were opposed to military rule and policies.

However, with colonialism long gone, independence and the advent of democratic rule, there were heightened expectations from the populace that they will have a Police Force that is not only people-oriented but civil in its dealings with the public; a Police Force that respects their constitutionally guaranteed rights and freedoms; a Police Force that is able to maintain law and order within prescribed limits; a Police Force that effectively protects the lives and property of all citizens irrespective of status and above all, a Police Force that will be politically neutral in the event of disagreements between competing political persuasions in the polity.

But how has the Police force fared under democratic governance? Do Nigerians now have the kind of Police they desire? How far has the Police Force been able to discharge its constitutional roles in a democracy? While it may not be easy to answer all these questions in a simple 'yes' or 'no' format, it is perhaps necessary to examine certain indices against which we can measure Police performance in order to ascertain whether or not they have met the expectations of the people.

First, crime prevention and detection has remained one area which the Police Force has not been able to tackle effectively since 1999. There is a general perception that the crime rate in the country has increased with the Police being increasingly unable to cope with the problem. There have been increasing reported incidents of armed robbery on the highways, assassinations, bank robberies and burglary in the metropolis. Insecurity of life and property has become the order of the day. This is despite the creation of crack units all over the country and the "Operation Fire for Fire" squads. This general sense of insecurity has been heightened by high profile killings in the

country. The situation got so bad at a time that Ministers and Governors and their convoys became subjects of frequent attacks by armed bandits all over the country.

Second, the maintenance of public peace, law and order has been another big challenge that has confronted the police force since the return of the country to civil democratic rule. The proliferation of ethnic based organisations as a fallout of military rule and the annulment of the June 12 1993 Presidential Elections, purportedly won by the late Chief M.K.O Abiola created a lot of problems all over the country. In the Western parts of the country, the Odua Peoples Congress (OPC) became so lawless and uncontrollable in their so called "defence of Yoruba interests", The Bakassi Boys in the Eastern parts of the country became a parallel police force. These groups arrogated to themselves the power of arrest and detention of people in unauthorised places; they routinely extracted confessions from accused persons through threats and intimidation and carried out trials by ordeal, extra-judicial killings in the name of protecting group or ethnic interests and the entire citizenry from criminal activities.

The Egbessu Boys of the south-south geopolitical zone were not any different in their methods of operation. The Arewa Youth Congress was established as the Northern challenge to the OPC in South Western Nigeria. The situation was so volatile that it appeared that the nation was sitting on a 'keg of gunpowder' waiting to explode. So when the Idi Araba, ketu and Shagamu ethnic clashes involving the Hausa and Yoruba ethnic groups took place in Lagos and Ogun States respectively, the police was unable to contain the situation. The Military was once more drafted to assist the police in maintaining law and order as was the case during military rule. The Ethnic clashes involving the Tivs and Jukuns in Taraba State in 2002 and the one in Nasarawa State in 2003 were also glaring examples of the inability of the Police Force to discharge their functions as and when the

occasion demanded it, as it took the invitation of the armed forces for law and order to be restored in these places.

Third, the repressive activities of the police have continued even in a democracy as human rights abuses and several incidents of extra-judicial killings were reported throughout the country as a result of the activities of some overzealous Police Officers. The general economic hardship experienced in the country also created fertile ground for the Police to extort money from the people through check points, "stop and search" and routine arrests. It therefore appears that the Police Force is yet to re-orient itself from the anti-people Force of old, despite the advent of democratic government.⁵⁴ This is contrary to the image the authorities want the populace to have of the police that "...of courteous, polite, well disciplined and well behaved police officers and men who are truly friends of the people."

Thus, for the average Nigerian, it may be correct to state that the police performed below expectation in discharging its responsibilities. Whether this is attributable to the structure or some other factors external to the Police structure, is moot. What is however not in doubt is that some form of re-engineering is required to enable the Police to perform its constitutional roles in accordance with democratic tenets and the wishes and expectations of the people.

Is Decentralization an Option for Nigeria?

The Constitution provides for the establishment of the Nigeria Police Force and forbids the establishment of any other police force for Nigeria or any other part of the federation.⁵⁵ However, there are those who share the view that this central police force has failed in the discharge of its responsibilities. The perceived failure of the Police to effectively discharge its constitutional role in the polity has generated a lot of reactions from the populace.

54. See Human Rights Watch: "Nigeria: Rest in Pieces" available at www.hrw.org.ht visited 10/11/2005.

55. Section 214(1) 1999 Constitution

Prominent among the fall-outs of this situation are the persistent calls for further decentralization in line with the federal system of government culminating in the call for the creation of 'State Police' with some State Governors as vanguards.⁵⁶ Governor Bola Ahmed Tinubu of Lagos State for instance is convinced that a 'State Police' will be better funded, trained and equipped to handle the exigencies of crime detection and prevention in a modern society.⁵⁷

Proponents of this view find ready support in the federal structure of the country, as they argue that 'State Police' is a logical imperative of genuine federalism and call for the division of powers (including that of policing the country) between the central government and the component units as would best preserve their independence and enhance their performance within the respective spheres of influence.⁵⁸

It is further argued that the provisions of section 215(4) of the 1999 Constitution which empowers the Governor of a State or his designate to give the Commissioner of Police of that State "such lawful directions with respect to the maintenance and securing of public safety and public order within the State as he may consider necessary, and the Commissioner of Police shall comply with those directions or cause them to be complied

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56. See for Instance, Oyediran, O.: "Structure of Government and Devolution of Powers" in Ajomo M.A. *et al* (eds), *Constitutions and Federalism*, Lagos: Friedrich Ebert Foundation, 1996. Governor Bola Ahmed Tinubu of Lagos State has persistently called for the creation of State Police with Governors Chinmaroke Mbadinuju, former Governor of Anambra State, Orji Uzor Kalu of Abia State and Achike Udenwa of Imo state as active supporters.
57. Governor Tinubu of Lagos State is reported to be spending N100 Million monthly in cash and Logistics on the Police Force over which he has no operational control over. See *Vanguard, Newspaper*. Monday, October 14th 2001.
58. Reliance is also placed on section 11(2) of the 1999 Constitution which empowers State Houses of Assembly to make laws with respect to the maintenance and securing of public safety and public order within their states. See Otiye Igbuzor and Oladele Bamidele (eds) *Contentious Issues in the Review of the 1999 Constitution*. Lagos, CFR 2000 p. 111.

with," cannot be given due effect without the machinery of State Police.

Under the present arrangement, the Constitution assigns to State Governors a role in the maintenance of public safety and public order, but proceeds to actually deny them independent capacity to discharge these responsibilities. This is because the proviso to section 215(4), stipulates that before carrying out any such directions of the Governor (with respect to maintaining public safety and public order in the state) the Commissioner of Police may request that the matter be referred to the President or such Minister of the Government of the Federation as may be authorised in that behalf by the President for his direction.

Advocates of 'State Police' generally view the proviso to section 215(4) as a clear breach of the principles of federalism, as it renders States incapable of independent execution of their duties to residents.⁵⁹ It is thus contended that this arrangement creates a fertile ground for the federal government to abuse the system in order to impose their preferences upon States. The creation of 'State Police' is therefore seen as a panacea for resolving the contradiction and securing the independence of the States in the vital area of securing public safety and order.⁶⁰

Furthermore, proponents of 'State Police' contend that the idea is not in any way alien to the country⁶¹ as the country at different periods of its development had Local Government Police and Regional Police which were controlled by the regions before the creation of states was embarked upon by the Military in 1968.⁶²

59. *Ibid* p. 111.

60. *Ibid*.

61. Besides the Nigeria Police Force, there were in both the Western and Northern Regions several local authority and native authority Police Forces respectively. The Republican Constitution of 1963 in operation at the time permitted the legislature of a Region to make provisions for the maintenance by any authority.

62. The proponents of state police argue that the amalgamation of the Federal and Local Police Force deprived many communities and villages of the presence of policing, a factor which influenced calls for the provision of state police alongside Federal Police in the 1979 Constitution. The 1979 Constitution

It also argued that the current Police structure is unwieldy, excessively bureaucratic and therefore inefficient in the discharge of its duties. To demonstrate the extent to which such views were generally accepted, some State Houses of Assembly, for instance, Anambra State, passed a vote of no confidence on the Police and proceeded to pass laws for the creation of State Vigilante Services (a disguised form of state police since the 1999 Constitution does not provide for the establishment of state police) to combat crimes and violent criminal activities within their states. In some States in the country, particularly in the South West and South-eastern parts of the country, the citizenry at some point, appeared to have preferred to deal with the Vigilante groups rather than the police.

In giving vent to the call for decentralization of the Police Force, Ademola Popoola is of the view that the decentralization process can take the form of:

- (i) increased decentralization of control with a view to giving the Governor of the State (the Chief security Officer of the State) a higher level of authority over the Commissioner of Police in charge of the state command, or
- (ii) allowing States to establish their own police under the Constitution.⁶³

however, retained a single police force for the country and provided for the establishment of the Police Service Commission which had power to vet appointments or removal of police personnel, excluding the Inspector General of Police in consultation with the President. There was however, no provision for the establishment of the Police Council as was the case in the 1960 and 1963 Constitutions. Furthermore, directive powers on security matters by state Governors was removed, they could only give lawful directions through a written notice to the President. See Jemibewon, D. *op cit*.

63. See Popoola, A. O.: "Ethnic Conflicts and National Security" in Guobadia, D.A & Adekunle A.O.: (eds) *Ethnicity & National Integration in Nigeria Recurrent Themes*. Lagos: NIALS, 2004 p. 149.

It appears from the above recommendations that Popoola favours a middle-course approach to decentralization that will give State Governors some measure of control over the Police Force stationed within their jurisdictions. It is only where this control cannot be guaranteed within the present structure that he sees the creation of State Police as a viable alternative.

The opponents of "State Police" however contend that as persuasive as the arguments for State Police are, the history of the country suggests that state police is a recipe for anarchy which will not do the country any good.⁶⁴ They consider the call for State Police as a threat to National unity. To this group, a Police Force controlled by a State owes its allegiance to that particular state and if for any reason, the people of that state are embroiled in a dispute with another state; the police force of the feuding States will most likely support their respective states against the other. In a situation such as this, the police will be incapacitated and unable to maintain or restore peace as they will instead, support their State to win. But a Police Force that owes allegiance only to the Federal Government will not only remain neutral but will work to restore peace.

It is further contended that a Police Force made up predominantly of indigenes of one state may instead of assisting to maintain law and order in times of ethnic clashes such as the ones witnessed between Hausas and Yorubas in Shagamu or Tivs and Jukuns in Taraba State, would be preoccupied with helping their kith and kin to deal ruthlessly with those that are not from their state.

64. For instance, Chief Chukwumeka Ezeife, former Governor of Anambra State is of the view that the idea of having a State Police is premature, given the fact that Nigeria's democracy is at the embryonic stage. He berated the Federal Executive Council for giving approval to the creation of State Police in principle. He however, favours a zonal arrangement by which power will be ceded to Governors within the present zonal structure of the Police to be able to exercise operational control over the Police in their respective Zonal Commands. See *Vanguard Newspaper*, Monday October, 14th 2001.

Most disturbing of all these circumstances, is the fact that ready examples are given of instances when politicians abused their powers relating to the police thereby occasioning crises in the polity. Apart from the issue of abuse, the calls for the creation of 'State Police' have been faulted on the grounds of affordability. It is argued that in a country where some states:

- a) are unable to pay the National Minimum Wage;
- b) have unpaid arrears of salaries running into several millions of naira;
- c) depend on federal allocations for sustenance, etc., the assumption of the enormous responsibility of eatering for the needs of a 'State Police' in terms of cash and logistics will be akin to moving from the proverbial 'frying pan to fire' which could exacerbate the already bad situation in the country.

Opponents of 'State Police' also argue that federalism is not a uni-linear process that functions only in the direction of granting autonomy to the federating units. It is also about the centralisation of certain aspects of the management of culturally diverse societies in order to attain unity in diversity. This essentially means that the people are also free to determine what part of their lives, including the Police, that they would want centralised.⁶⁵ They also deny that inefficiency, mismanagement and corruption that presently characterise police operations are inherent in the centralised structure of the police. To them, what is required is a reformation of the Police to make it properly suited to the new role of policing in a democratic society.⁶⁶

The foregoing notwithstanding, It is important to appreciate the fact that both the centralised police system and the decentralised one have been operated with relative degrees of

65. See Otive Igbuzor and Oladele Bamidele (eds) *op cit* p. 113.

66. *Ibid.*

success in different jurisdictions.⁶⁷ This means that there is nothing inherently wrong with either of the systems. It is the peculiarities of each jurisdiction that determine whether or not a particular system is desirable in that jurisdiction.

While complaints about the apparent inefficiency of the police as well as the dissatisfaction of State Governors with their performance, especially with respect to the maintenance of law and order, cannot be ignored, the fact remains that in Nigeria, the solution may not lie in the creation of "State Police". A re-engineering process that takes into cognizance, the power relations in the polity and the need to promote national unity rather than chaos just to satisfy the yearnings of some people for more power over the coercive machinery of the State is. Since democracy is about compromises, reconciling conflicting interests, there is need to come to some form of arrangement that would preserve the national outlook of the police while granting State Governors some measure of influence and control over the affairs of the police within their respective jurisdictions.

The Way Forward

We are of the view that the present structure of the Police is adequate for the purpose of discharging its constitutional and operational responsibilities in a democracy. While there is some merit in the call for decentralisation of the Police, what appears in our humble view to be the bone of contention is not the structure of the police *per se*, but the measure of control that State Governors are able to exert on its operations.

Thus agitations for 'State Police' are merely indicative of the level of operational control which State Governors want to have over the Police within their respective jurisdictions.⁶⁸ This

67. There are some Federations that have successfully operated the State Police Structure such as Germany, which has sixteen State Forces; Belgium operates a municipal policing system while Australia and France are good examples of countries with centralised federal police systems.

68. During the 2nd Republic (1979-1992) Chief Jim Nwobodo, former Governor of Anambra State had a running battle with the State Commissioner of Police who

control is to forestall possible use of the Police by the opposition to harass and intimidate their supporters especially where the opposition party is in control of the federal government which constitutionally controls the affairs of the police. Recent events in Anambra, Oyo and Ekiti States which depicted that State Police Commissioners were not subject to the control of Governors in whose jurisdictions they operate especially in conflict situations involving the federal government or its agencies, seem to justify this fear that the federal government may also be found wanting in its use of the Police.⁶⁹

It would however appear that many Nigerians are opposed to the creation of State Police entertain strong reservations about it. The general belief seems to be that Nigeria is not ready for 'State Police' at least not in the immediate future. Thus, if the real issue is fear of possible abuse of Police powers, harassment and intimidation, it behoves on all stakeholders in the polity to explore an agreeable way of ensuring that all the respective tiers of government "have a say as to how the Police is run."

One way of achieving this is to use the existing institutional mechanism provided by the Constitution, the Police Council, which unfortunately has been largely ignored or poorly explored

literally ignored directives from the State Governor relating to sensitive state security matters. The Governor could not do anything about it because the operational control of the Police rested with the Federal Government which was controlled by the National Party of Nigeria (NPN) as against the Nigeria Peoples Party (NPP) which formed the government in Anambra State.

69. In conflict situations, especially political conflicts involving the interest of State Governors against that of the federal government, the police have tended to side with the federal government. In Anambra State, police protection was withdrawn from Governor Chris Ngige for several months when he had brushes with the federal government. In Ekiti State, the Police appeared more eager to enforce the orders of the Acting Chief Judge who was acting in concert with the State House of Assembly in their bid to remove Governor Ayo Fayose, than the orders of the Chief Judge of the State in the recent impeachment saga. The same scenario played out in the removal of Governor Rashed Ladoja when he ran into difficulties with his political godfather, Chief Adedibu who was alleged to enjoy the support of the Peoples Democratic Party leadership at the National level.

in the past to address the concerns of State Governors regarding the operations of the Police.

The Police Council is one of the Federal Executive Bodies created by section 153 of the 1999 Constitution. It is comprised of the President who is the Chairman, all the Governors of the States in the Federation, the Chairman of the Police Service Commission and Inspector General of Police. Its functions include; organisation and administration of the police and all other matters relating thereto (not being matters relating to the use and operational control of the Force or the appointment, disciplinary control and dismissal of members of the force); the general supervision of the Nigeria Police Force and advising the President on the appointment of the Inspector General of Police.⁷⁰

It is obvious from the foregoing that a body exists with supervisory powers over the organisation and administration of the Police to which the Governors belong. If properly utilised, the Police Council can provide an avenue by which the activities of the police can be examined, appraised or reviewed on a regular basis with a view to correcting whatever anomalies that may be found in the system. It can also be used to nip in the bud, negative tendencies on the part of the Inspector General of Police, State Commissioners of Police and other officers who may be overreaching their positions to the detriment of the polity.

To ensure that it is effective, a process of constitutional amendment should be carried out to expressly clothe the Police Council with 'direct power over the use and operational control and discipline of the Police.' This will ensure that complaints about the conduct of the Police by any Governor would be addressed at the highest level of the Police hierarchy. Although there may be fears that the President against whom some Governors may harbour grievances is also the one that chairs the meetings of the Police Council and may conduct its proceedings to the detriment of such Governors, especially where he refuses

70. See generally: Part I Third Schedule to the 1999 Constitution

to convene a meeting of the Council, it is inconceivable that the President would continue to ignore genuine complaints from State Governors about the conduct of his appointees such as the Inspector General of Police or Commissioner of Police. A President that does that will surely lose the confidence and support of the Governors who he needs to maintain law and order in the country.

The Governors should therefore be encouraged to seek proper use of the Police Council to address whatever fears and concerns they may have relating to the administration of the Police Force rather than resort to the present call for 'State Police' which is largely viewed to be ill-timed and politically motivated. After all, Ogunsanwo has aptly observed that "there is more to policing a society than the simple constitutional provision contained in a country's fundamental law. Each country has its own historical experience, which shapes the establishment and formation of its police force."⁷¹

Another form of re-engineering that is feasible within the present structure of the Police is the suggestion put forward by Chief Chukwuemeka Eziefe⁷² to the effect that Governors should constitute the highest hierarchy within the present Zonal Structure of the Police Force within their respective Zones. This arrangement could be varied to enable the Governors have operational control over the police without necessarily compromising the Federal outlook of the Police. This can be further replicated at Senatorial Zones with the various Local Government Chairmen at the highest levels. It is argued that this arrangement would not only give the various tiers of Government a say in the way the police within their respective jurisdictions is being run, but also, some measure of control required to enable them have confidence in the Police Force. The fact that no one single Governor or Chairman would have exclusive control over the Police as it would be administered by a Committee

71. Ogunsanwo, A. *op cit* p. 288.

72. *Supra* note 46.

comprising all the Governors and Chairmen within a given Zone, the possibility of abuse would be minimised if not totally eliminated.

The major attraction for this proposition is that it complements the Constitution. Since the Constitution has vested the Governors with powers as chief security officers of their respective states, they should not be hamstrung in exercising those powers but should be assisted in every way possible to achieve that objective. The radical way of ensuring that this is accomplished is a constitutional arrangement which grants to the Governors some reasonable measure of control over the operations of the police in their respective jurisdictions.

To give effect to this proposition the proviso to section 215 (4) of the 1999 Constitution should be expunged as it is not particularly enabling. The provision needlessly places Governors in a helpless situation even in times of crises as the directives to their respective Commissioners of Police are subject to vetting by the President who may not be really familiar with the genesis of such crises. What happens where there is an emergency and the Commissioner of Police insists on getting clearance from the President before acting? Or where such clearance is not forthcoming? In such circumstances, there may be a complete breakdown of law and order with attendant consequences on the polity. Closely related to this issue, is the need to clarify what matters that the Commissioners of Police may refer to the President before acting on the directives of Governors if this proviso is to be retained in the Constitution. Where such clarification is provided and agreed upon by all concerned, then on all other matters not so specified, the Commissioners of Police should be completely subordinated to the State Governors.

Beyond the issue of control, there are other germane areas in which some re-engineering is important in order to properly focus the Police for its constitutional role. One such area is assigning military duties to the Police under the Police Act. While this may have been necessary during the colonial era there

was no standing army for what became Nigeria, it is today an aberration after four decades of independence with a standing Army, Navy and Air Force. The danger inherent in this arrangement is that the Police Force has continued to operate as a "Force" rather than a service-oriented institution. This has reflected in the way it has discharged its responsibilities, often times in a repressive manner to the detriment of the citizenry. Thus, the amendment of the Police Act to divest the Police of military duties will, in our respectful view, contribute positively towards re-orientating the police for its role in a democracy. The adoption and implementation of a new code of conduct for the Nigeria Police in line with the United Nations Code of Conduct for Law Enforcement Officials will also assist the police in ensuring that the fundamental freedoms of the citizenry are protected in the exercise of its policing powers.

Finally, it is apposite to state that the re-engineering process will not achieve the desired objective if the necessary funding required to enhance the operational efficiency of the police are not provided. Over the years, the funding of the police has been dismal especially under successive military regimes. This contributed immensely to reducing the operational efficiency and effectiveness of the Police. A poorly paid, ill equipped and poorly trained Police Force with fast declining morale is not what Nigerians expect of their institutions today. This is more so, as the advent of democracy has brought in its wake new challenges for the police in their quest to detect and prevent crime and maintain law and order. A country with an estimated population of over 120 Million people spread over 36 States and 774 Local Governments requires proper funding for any meaningful policing. The Budget for the police should, therefore, reflect these challenges and realities if it is to provide effective policing for the country.

Conclusion

This chapter has shown that although complaints about the operational efficiency of the police are well founded, such inefficiency is not directly attributable to the structure of the police. While the Command structure of the police which is a feature of the centralised system has generated negative comments, the point must be made that there is nothing inherently wrong with either the centralised or decentralised police system as both systems have worked with relative degrees of success in different jurisdictions.

The chapter has therefore taken the position that the calls for decentralization of the police force are largely indicative of the measure of control political actors want to exert on the police in order to prevent possible abuse of police powers by those with their operational control. Since the political history and experience of the country seem not to support the calls in some quarters for the decentralization of the police in the form of the establishment of "State Police," what is recommended is a delicate balancing and reconciliation of these competing interests to ensure that while the federal outlook of the police is maintained, all the other centres of power (State and Local governments) have a say as to how the police is run. This will, in our humble view, ensure peace and harmony in the polity as well as promote public confidence in the operations of the police.

FAIR HEARING AND LAW ENFORCEMENT:
SOME RECENT DEVELOPMENTS

by

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Introduction

"In this area of the world where crimes of violence are on the increase and means of investigation are in their rudimentary stage of development coupled with the secrecy with which these crimes are committed and the shuffling faith in the concealment of facts by whatever means by the perpetrators of these crimes, the responsibility of ensuring security for the lives and property of our citizens demands the detection of the perpetrators of these crimes by all means allowed by law. Detection of crimes is a never ending task the Police is called upon to perform and in the performance of this task they ought to be able to bear the suspects in their game of hide and seek..." *Per Obaseki JSC in Igbinovia v State*"¹

The right to fair hearing is enshrined in section 36 of the 1999 Constitution which in subsection (1) outlines the general rule thus:

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

The Constitution then makes in the following eleven subsections provision for particular circumstances. For the sake of brevity these confer on the individual the right to:

- (1) have proceedings conducted in the open or in public;
- (2) be presumed innocent until proven guilty;
- (3) understand the nature of the offence against him and the trial proceedings (including the services of an interpreter free of charge);
- (4) cross-examine prosecution witnesses
- (5) a counsel of his choice;
- (6) access the record of proceedings of his trial within seven days of the conclusion of trial;

In addition to these, section 36 provides that no person who is standing trial shall be compelled to give evidence at the trial and further that no person who has been tried or pardoned for a criminal offence shall again be tried for that offence. Despite the detailed provisions of section 36 the scope of the right to fair hearing has been described as vague and incapable of precise definition.² In ascertaining the boundaries of the requirement of fair hearing there is a tendency to focus exclusively on the trial proceedings as if to deny that pre-trial procedures can adversely affect the right to a hearing which is fair. This approach is manifest in the following statement by Hon Justice Oputa when he observed thus:

“There has to be a hearing in the first instance before one can be invited to examine whether or not such hearing was a fair hearing. To constitute a hearing, both parties to the issue must know what the case is all about and then be allowed to call evidence in support or contradiction of that issue. The hearing should also be before an

2. See *Ijeoma v State* (1990) 6 N.W.L.R. (pt158) at p. 570

impartial *judex* who has the legal and constitutional capacity to adjudicate over that type of cases..."³

It is our position that fair hearing goes beyond the nature of the actual proceedings before a court. It is increasingly becoming clear that certain deprivations and measures when visited on an accused person or a suspect in the course of an investigation, are capable of robbing the suspect of the right to fair hearing. The question whether such a challenge can be taken before trial is no doubt one of complexity. How is one to challenge pre-trial police procedures for example, as a fair hearing matter, when proceedings are yet to be initiated or indeed when several of the rights are worded expressly in terms of persons *charged with a criminal offence*?⁴ The matter is however answered by the provisions of section 46 of the Constitution to the effect that a likely or threatened breach of a fundamental right can be restrained. Considered in this light can a suspect legitimately challenge the legality of the following measures before the commencement of his trial:

- (1) Where the suspect is denied access to counsel while in custody;
- (2) Where the suspect is forced or coerced upon pain of imprisonment to make a statement (not a confession) which forms part of evidence against him;
- (3) Where the resources of the suspect have been seized or frozen by the state so that a counsel of the suspect's choice cannot be retained;
- (4) Where the suspect is detained interminably without trial or knowledge of the offence he is being charged with.

3. Oputa C.A.: *Human Rights In the Political and Legal Culture of Nigeria* (Lagos, Nigeria Law Publications, 1989) page 99.

4. Underlining mine

Some of our assumptions about these issues hitherto thought to be settled are being constantly challenged by a rash of enforcement powers wielded by some law enforcement agencies notably with regard to the crimes of corruption, drug trafficking, fraud and financial crimes. These issues also show how closely affiliated the right to liberty is to the right to fair hearing when considering whether a suspect or accused person has been treated justly by the criminal justice system.

It is not only in relation to pre-trial "police" procedures that we see these incursions into fundamental rights. In combating crimes such as terrorism corruption and fraud, the legislature has launched a determined assault on the presumption of innocence and the corresponding right of silence, while also waiving aside a requirement of culpability or guilt before interfering with the assets of suspects. Under these laws a person can be "invited" to appear before a law enforcement officer and compelled to fill out a standard questionnaire on the quantum, value, origin and location of his assets. Should it make a difference that the person has not been arrested or that the statement was not in direct response to questions put by interrogators? When such a declaration procured upon pain of punishment is used as evidence by the prosecution, what should we make of the rule that an accused should not be compelled to testify against himself⁵? It is true as aptly captured by Justice Obaseki that there is a need for law enforcers to be several steps ahead of criminals who are increasingly becoming more sophisticated; however this should not be at the expense of constitutional liberties. In the ensuing discussion we will look more closely at these provisions and the approach of the courts where these conflicts have arisen. Our models will be the Corrupt Practices and Other Related Offences Act⁶ (Anti-corruption Act) and the Economic and Financial

5. See section 36 (11) 1999 Constitution: See also s. 160(a) and (b) Evidence Act Cap E 14 LFN 2004.

6. Cap C 31 LFN 2004.

Crimes Commission Act⁷ (EFCC Act). This is mainly on account of the fact that in the last 4 years, they have, in relation to the topic, received more judicial attention than other criminal law statutes.

The Presumption of Innocence

Section 36(5) of the Constitution provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. It must be quickly observed that in its broadest spectrum what this means is that none of the incidents of the penalty for the offence such as imprisonment, forfeiture or fines should be visited upon the accused person or suspect until a finding of guilt is returned against him by a court of law. However the Constitution itself permits such deprivations in limited circumstances before the commencement or conclusion of trial⁸. It also means that a person charged for an offence is not bound to prove his innocence; on the contrary it is the duty of the prosecution to establish beyond reasonable doubt the guilt of the accused person. The presumption of innocence is closely linked with the right of silence in the face of interrogation or actual proceedings. Both incidents are provided for in the Constitution, the former under section 35(2) while the latter finds expression in section 36(11) which provide that "No person who is tried for a criminal offence shall be compelled to give evidence at the trial." Our immediate focus here however is the issue of proof of guilt.

First, what are presumptions? A presumption is a conclusion of fact or law drawn by the court on the basis of other facts and in accordance either with legal provisions or the dictates of logic.⁹ The rationale for the use of presumption in proving corruption is explained by the fact that corruption is a crime that is attended by great stealth. Direct evidence is not often available and there is an obvious need to substantially lighten the burden of

7. No. 1 of 2004.

8. See section 35(1)(c) and section 44(2)(k) of the Constitution.

9. See section 4 of the Evidence Act Cap E 14 LFN 2004.

the prosecution. In this respect section 53 of the Anti-corruption Act creates certain presumptions of guilty intent. According to the provision:

- “(1) Where in any proceedings against any person for an offence under sections 8 to 19 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited given or agreed to be solicited or given, promised or offered by or to the accused, the gratification shall be presumed to have been *corruptly accepted or agreed to be accepted*¹⁰, obtained or attempted to be obtained, solicited, given or agreed to be solicited or given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence until the contrary is proved.
- (2) Where in any proceedings against any person for an offence under this Act or any other law prohibiting corruption, it is proved that such person has accepted or agreed to accept, obtained or agreed to obtain any gratification such person shall be presumed to have done so as a motive or reward for the matters set out in the particulars of the offence, until the contrary is proved”

Subsections (3) (a) and (b) also provide for presumptions of guilty knowledge and intention in specified circumstances. In addition, section 53 of the Act provides for presumptions of particular fact in certain offences namely:

- (a) in establishing the offence of gratification under sections 8 – 19 of the Anti-corruption Act, proof that a benefit or

10. Underlining mine.

gratification was received raises the presumption that it was received with corrupt intent and with a motive to influence the officials conduct in a corrupt manner

- (b) where a person receives property without consideration or for a consideration which he knows to be inadequate , there is a presumption of guilty knowledge where he is charged with any offence dealing with the unlawful receipt of property¹¹

To what extent to do these presumptions reverse the burden of proof? It will be appreciated that presumptions of the above type invariably put some pressure on the accused to offer some evidence in his defence.¹² How can this be reconciled with section 36(5) of the 1999 Constitution, which in providing that a person charged with a crime enjoys a presumption of innocence, puts the burden of proving guilt squarely on the prosecution.

The point however is that such presumptions do not reverse the burden of proof. The prosecution still has to establish its case beyond reasonable doubt, except that this task has been made lighter by the presumption. Under the Constitution this is legitimate. Subsection 36(5) while affirming that an accused person shall be presumed innocent until proven guilty, preserves the validity of any law, which imposes upon the accused the burden of proving particular facts.¹³ Given the secretive and sometimes complex nature of the offence of corruption and other financial crimes circumstantial evidence is of great importance. Similar views were expressed by the UK House of Lords in *R v Rezvi*¹⁴ concerning the compatibility of confiscation proceedings

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11. E.g. .the offence of money laundering under the Money laundering (Prohibition) Act 2004.
12. See *R v Oakes* [1986] 26 DLR 200 (4th).
13. See T.A. Aguda: Law and Practice Relating to Evidence (2nd edition, Lagos) pp 338 – 340; but in one English case the court reasoned that if the accused was required to disprove an essential element of the offence this would not be acceptable; see *R v Lambert and others* [2000] UKHRR 864.
14. [2002] UKHL 1 available also at

under section 72AA of the Criminal Justice Act 1988 with Article 6 of the European Convention on Human Rights 1954. The provisions authorized the court in proceedings for the forfeiture of assets of a person convicted for certain crimes, to make several assumptions as to the source of assets found on the convict at the date of conviction. Article 6 of the Convention guarantees the right to fair hearing in terms similar to the Nigerian Constitution. It states:

- “ (1) in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.....
- (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”

Holding that such statutory assumptions were not incompatible with Article 6 of the European Convention the court observed that:

“It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the

profits available to fund further criminal enterprises.”¹⁵

In the courts opinion there is the need in each case to weigh considerations of public interest with the rights of suspects subject to an overriding duty of the court to ensure justice. His Lordship quoted with approval the following statement by the Court of Appeal¹⁶ -

“This is therefore a situation where it is necessary to carefully consider whether the public interest in being able to confiscate the ill-gotten gains of criminals justifies the interference with the normal presumption of innocence. While the extent of the interference is substantial, Parliament has clearly made efforts to balance the interest of the defendant against that of the public in the following respects.

It is very much a matter of personal judgment as to whether a proper balance has been struck between the conflicting interests. Into the balance there must be placed the interests of the defendant as against the interests of the public that those who have offended should not profit from their offending and should not use their criminal conduct to fund further offending. However, in our judgment, if the discretions which are given to the prosecution and the court are properly exercised, the solution which Parliament has adopted is a reasonable and proportionate response to a substantial public interest, and therefore justifiable.”

Another important provision in this regard is section 44(2) of the Anti-corruption Act which provides that where the Chairman of the Commission reasonably believes that a public officer owns or controls any interest in property which is excessive, having regard to his present or ~~past~~ emoluments the Chairman may require him to furnish a statement on oath or affirmation explaining how he was able to own or control the excessive

15. Per Lord Steyn at paragraphs 14 -15.

16 Reported in [2001] 3 WLR 75 at p. 103 (paragraphs 86 and 87).

test and if he fails to explain satisfactorily, he shall be presumed to have used his office to corruptly enrich or gratify himself and charged accordingly. The purport of this provision is supported by the use of the word "charged." It is not clear whether the provision imposes liability for the crime or is merely setting parameters for the consideration of the Chairman in determining whether to charge a suspect to court; in which case the provision merely raises a *prima-facie* case against the suspect in terms of section 19 of the Anti-corruption Act which provides as follows:

"Any public officer who uses his office or position to gratify or confer any corrupt or unfair advantage upon himself or any relation or associate of the public officer or any other public officer is guilty of an offence and is on conviction liable to imprisonment for five (5) years without option of fine."

On the other hand and despite the awkward language of section 44(2), it can be argued that this kind of presumption which establishes guilt, goes beyond the species permitted by the Constitution. Therefore unless a satisfactory explanation is forthcoming, mere possession of property in excess of a public servant's legitimate income would sustain conviction for ratification under section 19 of the Anti-Corruption Act. The rationale for a provision such as this was justified by the Report of the National Committee on Corruption and Economic crimes in Nigeria¹⁷, which in fact recommended that the possession of unexplained assets should be made a substantive offence¹⁸.

¹⁷ Report of the National Committee on Corruption and Economic crimes in Nigeria 1990 (Eso committee report) p. 19.

¹⁸ Of section 10 of the Hong Kong prevention of Bribery Ordinance (Cap 201) which also makes possession of unexplained assets an offence.

Under a similar provision in the Indian Anti Corruption Act it has been held that once the prosecution proves:

- (b) that the accused is a public servant
- (b) the nature and extent of the interest in property or pecuniary resources;
- (c) the known sources of the accused persons income; and
- (d) that such interest held by the accused were disproportionate to his known sources of income the accused person must come up with a satisfactory explanation of the excess or be convicted.²⁰

It is submitted however that while apparently the Chairman of the Commission may file charges on account of an explanation which he considers unsatisfactory, the court in determining guilt is not bound to take his view as to whether the suspect's explanation is satisfactory or not. This is supported by the decision of the court in *Idowu v State*²¹ where in a prosecution for the stealing and forgery under sections 390, 465 and 467 respectively of the Criminal Code²² the Supreme Court declared that there is no law that says people who own property above their incomes are necessarily suspects who must have misappropriated funds of their employers. In the court's opinion however evidence of how the accused person acquired the properties in question as well as evidence of all other jobs or works that he did apart from his employment was admissible to rebut such a presumption.

Compulsory Interrogation

Central to the right to a fair trial is the right of silence, particularly the suspect's right not to be forced to incriminate

19. Section 13 (e) Anti Corruption Act No. 49 of 1988.

20. See *State of Mahitira-Shtra v Kaidalwou* A.I.R. 198 1 SC 1186; see also *G.V. N'unduah v State* (Delhi Administration) 1988 Cr L.J. 152 at 158).

21. (1998) NWLR (pt. 574) 354.

22. Cap 30 Laws of Oyo State 1978.

himself. While in some jurisdictions, courts have been driven to imply these rights into provisions on the presumption of innocence²³ the Nigerian Constitution's provisions on them seem sufficiently clear. In this regard section 35(2) of the 1999 Constitution provides that:

“Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice”

Section 36(11) similarly provides that a person standing trial for a criminal offence shall be compelled to give evidence at the trial. These constitutional provisions give rise to rights said to lie at the heart of the notion of a fair trial²⁴ and contribute towards the avoidance of miscarriages of justice. These principles have for so long formed the bedrock of our criminal procedure and evidence. Thus we find these rights well integrated in the Criminal procedure legislation and rules of evidence. These are components of the presumption of innocence enjoyed by the accused. There is no doubt some oddity in a system that does not encourage one who claims innocence to proclaim his innocence by seizing on the earliest opportunity to testify or make a statement to his interrogators. Indeed such a practice has been described as illogical and alien to the African culture²⁵. Such a view however assumes the ideal in custodial standards. The stark reality of interrogation and detention conditions in Nigeria do not elicit any confidence in the veracity of what is elicited from the suspect. One should not get carried away with reforms or the push for reforms in other jurisdictions where the administration of criminal justice is clearly more

23. See *Funke v France* (1993) 16 EHRR 297 at para. 44.

24. *Condron v UK* (2000) 8 BHRC 290 at para. 56.

25. See Oshipitan T.A. : Issues in Nigerian Law of Evidence in A. Obilade and G. Braxton: Due Process of Law, (Southern University and faculty of Law, University of Lagos, Lagos 1994) at p.110

advanced and more safeguards are provided suspects and accused persons.²⁶ There is no doubt much sense in a suspect insisting on seeing counsel if he can. In terms of the right of silence during trial it has always been open to the court to draw necessary conclusions bearing in mind the overall strength of the prosecution's case. Thus in *Garba v State*²⁷ the Supreme Court observed that although by virtue of section 236(I)(c) of the Criminal Procedure Code, the failure of the accused to give evidence shall not be made the subject of any comment by the prosecution, the court may draw such inference as it thinks just "what is important" said Mohammed JSC²⁸ "is that the discretion whether the Judge shall comment on the fact that the prisoner has not given evidence must not be exercised in such a way that it would imply that absence from the witness box is to be equated with guilt. The very fact that the law does not permit the prosecution to comment on that fact shows that the Judge must exercise extreme care in making such comments".

Over the course of years some attempt has been made to curb these rights on account of the seriousness of the crimes that are being legislated upon. The incursions have been subtle and proceed on the strict interpretation of the Constitutional provisions which specifically refer to a person arrested or a person facing trial. No where is this markedly noticeable than in legislation on corruption and economic crimes. The special nature of corruption and the challenges posed to law enforcement were vividly captured by the Eso Committee Report thus:

"Our legislation, if it is to be meaningful must not concentrate on a terse definition of "Corruption" and other Economic Offences. The draft should be made in a manner that would be so

26. See Report of the Royal Commission on Criminal Justice (Runciman Report), London July 1993.

27. (1997) 3 NWLR (pt 492) 144.

28. at pp 159 -160 C.f. R v Sullivan (1966) 51 Cr. App Rep. 102.

comprehensive and adequate enough to assist measures for the control, containment, or at least curtailment and prevention of these and allied malpractices in both the public and private sectors of the Nigerian society."²⁹

Apart from providing for comprehensive offences, the extant legislation on corruption and economic crimes also address challenges posed to investigation and trial of corruption by enhancing investigative and enforcement powers. One species of enforcement powers which is common to the statutes are compulsory interrogation powers which are to be found in section 27 of the Economic and Financial Crimes Commission Act on the one hand and sections 28 and 44 of the Anti-corruption Act. The provisions of the EFCC Act are reproduced in full:

27: (1) Where a person is arrested for committing an offence under this Act, such a person shall make full disclosure of all his assets and properties by completing the declaration of Assets Form as specified in form A of the Schedule to this Act.

(2) The completed Declaration of Assets Form shall be investigated by the Commission;

(3) Any Person who:

(a) knowingly fails to make full disclosure of his assets and liabilities ;or

(b) knowingly makes a declaration that is false; or

(c) fails, neglects or refuses to make a declaration or furnishes any information required, in the Declaration of Assets Form;

Commits an offence under this Act and is liable on conviction to imprisonment for a term of five years."

Compulsory interrogation powers are particularly useful tools for the investigation of crimes where the suspect is so

29. Eso committee report at p.13.

placed as to be in possession of the material facts. In the case of economic crimes the identification of the assets acquired with proceeds of the crime invariably provides a trail to establish guilt, for as we have seen there is a burden on the suspect to explain the legitimacy of the source of wealth. However while it is obviously in the public interest to uncover crimes and expose criminals this objective must be balanced with the constitutional imperatives enshrined in sections 35 and 36. It is submitted that requiring under pain of imprisonment a person arrested for an offence to make a declaration of his assets whether or not the declaration is incriminatory without more infringes section 35(2). It does not matter that the Commission did not find the declaration useful or that it was not tendered in evidence in the trial of the suspects. This type of declaration must be distinguished from the requirement imposed on public servants to periodically declare assets under the Code of Conduct³⁰. At the time of making the declaration under the Code the declarant is not under suspicion of crime or in detention. By comparison the provisions of the Anti-corruption Act are more subtle and clearly mischievous. Section 28 suffices for present purposes. It provides:

“28. (1) An officer of the Commission investigating an offence under this Act may -

- (a) order any person to attend before him for the purpose of being examined in relation to any matter which may, in his opinion, assist in the investigation of the offence;
- (b) order any person to produce before him any book, document or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation of the offence; or
- (c) by written notice require any person to furnish a statement in writing made under oath or affirmation setting out therein all such information required under

30. See paragraph 11 of the Code of Conduct Fifth Schedule 1999 Constitution.

the notice, being information which, in such officer's opinion, would be of assistance in the investigation of the offence.

(2) Subsection (1)(b) of this section shall not apply to banker's books save in accordance with the provisions of the Evidence Act.

(3) A person to whom an order under subsection (1)(a) of this section has been given shall:

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination disclose all information which is within his knowledge.

(4) A person to whom an order has been given under subsection (1) (b) of this section shall not conceal, destroy, remove from Nigeria, or mutilate, expend or dispose of any book, document, or article specified in the order or relevant to the investigation, or alter or deface any entry in such book or document, or cause such act to be done, or assist or conspire to do such act.

(5) A person to whom a written notice has been given under subsection of this section (1)(c) shall, in his statement, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him.

(6) A person to whom an order or a notice is given under subsection (1) of this section shall comply with such order or notice and with subsections (3), (4) and (5).

(7) -

(8) -

(9) The record of an examination under section 27 of this Act, a written statement on oath or affirmation made pursuant to or any book, document or article produced under section 27 of this Act, or otherwise in

the course of an examination under section 28 of this Act, or under a written statement on oath or affirmation made pursuant to sections 27 and 28 shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court:

- (a) for an offence under this Act; or.
- (b) for the forfeiture of any property pursuant to section 47 or 48 of this Act, notwithstanding that such proceedings are against the person who was examined, or who produced the book, document or article, or who made the written statement on oath or affirmation, or against any other person.

(10) Any person who contravenes this section of this Act is guilty of an offence punishable with a term of imprisonment not exceeding 3 months.” Unlike the EFCC Act the provision avoids the use of the term arrest. It employs a so called power to “order attendance” One view of the matter is that at the material time contemplated by these provisions no question of arrest or detention arises. In other words if a person being examined under sections 29 and 44 is forced by compulsion of law to disclose incriminating information his constitutional rights under section 35(2) or 36(11) would not have been breached since the constitution only contemplates persons arrested or facing trial. This cannot be good law. The so called distinction between an invitation and arrest cannot rob the provisions of substance. This at least would seem to be the view of the Supreme Court in *Attorney General of Ondo State v AG Federation*³¹ when it held that the compulsion to make repeated visits in response to the Commissions invitation while not a detention eroded the substance of the individual’s right of liberty.

The provision goes on in subsection (9) to authorize the use of material obtained as a result of the interrogation in the subsequent trial of the suspect. Clearly if such a situation is permitted the fairness of the subsequent trial is illusory as the constitutional protection that declares that the accused person should not be compelled to give evidence becomes valueless. There is no doubt a dilemma here and it is not borne by the suspect alone. On the one hand is a clear unwarranted derogation of the substance of the provision protecting an accused from giving compulsory evidence by section 28(9)? on the other hand is the question as to why relevant and material information should be suppressed despite larger interests of security.³² What seems reasonable? In some jurisdictions a compromise has been struck by stipulating that answers or facts discovered in exercise of such inquisitional powers should not be used in trial.³³ Clearly there are many ways by which facts disclosed by a suspect can aid investigation without it necessarily being tendered as evidence in court.

In *Saunders v UK*³⁴ the applicant had been questioned by the Department of Trade inspectors using their compulsory powers of questioning under sections 432(2) and 436(3) of the United Kingdom's Companies Act 1985. The applicant was subsequently charged with a number of criminal offences and at his trial the trial judge admitted in evidence answers obtained by the Department of Trade and Industry inspectors under s. 431(5) of the 1985 Act. The applicant complained to the European Court alleging a breach of Article 6 of the European Convention.

The starting point for the European Court was the use that had been made of the interviews. Although the interviews did not contain admissions of guilt they included material that was

32. Note derogations to sections 35 and 36 expressly permitted under sect 45 of the 1999 Constitution.

33. See e.g. section 2(2)(b) Interception of Communication Act 1985 (U.K.) see also Investigation of Serious Economic Offences Act 1991 (South Africa) and *Rose v Director, Office of Serious Economic Crimes* [1995] S.A. 148.

34. (1996) 23 EHRR 313.

deployed against the applicant at his trial. In the courts opinion this was a direct assault on the substance of the right of silence. Similarly in *Heaney and McGuinness v Ireland*³⁵, both applicants were arrested in the Republic of Ireland as suspected terrorists under s. 30 of the Offences Against the State Act 1939. Although they were cautioned that they had a right to remain silent in the course of interviews, the terms of s. 52 of the Act were read to the applicants. This provision entitles a police officer to demand from a suspect a full account of his movements and actions during a specified time and to provide all information in his possession in relation to the commission or intended commission by another of acts of terrorism. By virtue of s. 52(2) a suspect's failure or refusal to give such an account or information which is false or misleading constitutes a criminal offence which carries a maximum sentence of six months imprisonment.

The European Court rejected the argument that the nature of the sanction was important and said that the only relevant factor was that the sanction was criminal in nature. Section 52 'destroyed the very essence of [the] privilege against self incrimination and [the] right to remain silent'. The European Court also rejected the Irish Government argument that security and public order concerns meant that s. 52 was proportionate response to the threat of terrorism.³⁶ There must, therefore, be a link between the material obtained and its use in criminal proceedings. Compulsory powers which do not result in criminal proceedings do not necessarily breach Article 6.³⁷

Following the decision in *Saunders*, a greater need to evaluate the proportionality of enforcement methods vis a vis Convention rights resulted in a policy of not using against an accused in criminal proceedings evidence obtained by

35. (unreported) App. No. 34720/97, 21 December 2000.

36. Similar arguments were rejected by the court in *Saunders*.

37. *Ahgas v Netherlands* [1997] EHRLR 418; *K v Austria* (1993) A/255-B.

compulsory questioning whether before or after charge.³⁸ On the other hand the peculiarly challenging and complex nature of modern crimes also led to amendments to the UK criminal law expressly permitting under sections 34 and 35 of the Criminal Justice and Public Order Act 1994 adverse inferences to be drawn by the court from a failure on the part of accused persons to answer questions or testify.

Conclusion

Clearly there are lessons to learn from these jurisdictions, albeit the protection in Nigeria and permitted derogations are expressly spelt out in the Constitution. In the case of sections 35 and 36 rights, none of the derogations permitted by the Constitution justify the sort of provisions under review. We are not therefore permitted to weigh the reasonableness or proportionality of compulsory questioning methods. No doubt the answers elicited from such powers even if not brought to trial can serve other purposes in the investigation of crime; There is it is true general authority on the admissibility of relevant evidence irrespective of the manner in which it was obtained³⁹ but that decision did not have breach of the constitution in contemplation or a case where the accused person is in substance compelled to produce evidence in his trial. Finally, whether the issue should be different if the evidence was material obtained as a result of the suspect's statement will necessarily depend on the nexus between the two and more importantly whether the prosecution can tender the material without reference to the statement.

38. *R v Secretary of State for Trade and Industry, ex parte McCormick* [1998] BCC 379.

39. See *Musa Sardau v State* (1968) 1 ANLR 125.

**CONSTITUTIONALITY OF LEGISLATIVE ACTIONS:
NATIONAL ASSEMBLY IN PERSPECTIVE**

by

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Introduction

On the 29th of May 1999, Nigeria rejoined¹ the league of democratic nations with the establishment of a democratic government under a written Constitution.² That Constitution, patterned along the American presidential system established the three main arms of government – the Executive,³ the Legislature⁴ and the Judiciary⁵ accorded prominence to the doctrine of separation of powers, and stressed the imperative of the rule of law. The Constitution gave distinct powers and responsibilities to each of the arms of government while at the same time not jettisoning the need for checks and balances. The Constitution has been operated for more than seven years now. Nigerians have seen the performance of the various organs of government within the confines of the Constitution. The period of the operation of the Constitution is such that it has provided ample opportunity for an assessment of the performance of these organs and the extent to which these organs have complied with the process of constitutionalism. This chapter examines the National Assembly as the legislative arm of the Federal government, its

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1. There have been efforts in the past at establishing durable democratic governance and institutionalizing constitutionalism in the country. Quite apart from the 1960 *Independence Constitution* and the 1963 *Republican Constitution*, the 1979 *Constitution* was the most visible attempt at joining the comity of nations where democracy thrives. Unfortunately, military interventions in the politic have always resulted in truncating democracy in Nigeria.
 2. Constitution of the Federal Republic of Nigeria, 1999.
 3. Section 5 *Constitution of the Federal Republic of Nigeria, 1999*.
 4. Section 4. *Ibid.*
 5. Section 6. *Ibid.*

establishment by the Constitution; its powers and responsibilities and the extent to which it has run foul of or complied with the Constitution in the exercise of its powers and the discharge of its constitutional responsibilities.

The National Assembly under the Constitution

The Constitution of the Federal Republic of Nigeria, 1999 established the National Assembly as the legislative arm of the federal government. It is a bicameral legislature consisting of a *Senate* and a *House of Representatives*.⁶ The Senate, often referred to as the Upper Legislative Chamber is headed by a President and a Deputy both of whom are elected by the members from among themselves⁷ and consists of three Senators from each State of the Federation and one from the Federal Capital Territory, Abuja.⁸

The House of Representatives on the other hand is made up three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one State.⁹ A Speaker heads the House of Representatives and is assisted by a Deputy. These two officers are also elected by the members from among themselves. While the President of the Senate presides over the proceedings therein and assisted by the Deputy¹⁰ the Speaker of the House of Representatives presides at the House of Representatives and in his absence the Deputy Speaker presides.¹¹

However at any joint sitting of the two Houses, the President of the Senate shall preside and in his absence, the Speaker of the House of Representatives.¹² In the absence of either of these two

6. See section 47, *Constitution of the Federal Republic of Nigeria, 1999*.

7. Section 50(1)(a). *Ibid.*

8. Section 48. *Ibid.*

9. Section 49. *Ibid.*

10. Section 53(1) (a), *Ibid.*

11. Section 53(1) (b). *Ibid.*

12. Section 53(2)(a). *Ibid.*

officers, the Deputy Senate President shall preside at any joint sitting of both Houses and in his absence the Deputy Speaker of the House of Representatives shall preside.¹³

Section 54 of the Constitution deals with *Quorum* - a matter that has some bearing on the present discussion. Quorum is deemed important because it may be a determining factor in deciding whether any legislative act is constitutional or not. In this regard therefore, the Constitution provides that the quorum of the Senate or of the House of Representatives shall be one-third of all the members of the legislative House concerned¹⁴ while the quorum of a joint sitting of both the Senate and the House of Representatives shall be one-third of all the members of both Houses.¹⁵

If objection is taken by a member of either House present that there are present in the House of which he is a member (besides the person presiding) fewer than one-third of all the members of that House and that it is not competent for the House to transact business, and after such interval as may be prescribed by the rules of procedure of the House, the person ascertains that the number of members present is still less than one-third of the members of the House, he shall adjourn the House.¹⁶ These provisions apply in relation to joint sitting of both Houses of the National Assembly as they apply in relation to a House of the National Assembly as if references to the Senate or the House of Representatives and to a member of either House are references to both House and to any of the National Assembly respectively.¹⁷

Powers of the National Assembly

The 1999 Constitution established a system of government in which governmental powers are clearly allocated to three

13. Section 53(2)(b). *ibid.*

14. Section 54(1). *ibid.*

15. Section 54(2). *ibid.*

16. Section 54(3) *ibid.*

17. Section 54(4) *ibid.*

different arms of the government – the Executive, the Legislature and the Judiciary. In this regards, the National Assembly as the legislative arm of the federal government is conferred with broad legislative powers. The Constitution empowers the National Assembly:

“...to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the constitution.”¹⁸

The areas of legislative influence of the National Assembly are exclusive to it alone save as otherwise provided by the Constitution.¹⁹ Now, without prejudice to the items listed in the Exclusive Legislative List of Part 1 of the *Second Schedule* to the Constitution, the National Assembly is further conferred with additional powers to legislate with respect to the following matters.²⁰

“(a) any matter in the Concurrent List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.”

It is instructive to note that the powers and role of the legislature as an organ of government have certainly gone beyond just law making and policy formulation. Thus, the National Assembly is further conferred with powers with regards to public

18. Section 4(2) *ibid.*

19. Section 4(3) *ibid.*

20. Section 4(4) *ibid.*

finance, powers to order and conduct investigation into the affairs of the government as well as powers to discharge oversight responsibilities in relations to government agencies and parastatals.²¹

The Constitution reiterated the supremacy of the laws made by the National Assembly over laws made by the States Houses of Assembly. Thus it provided that if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.²²

The exercise of legislative powers and responsibilities, both at the Federal and at the States level, is regulated by both the Constitution and Standing Rules of the House. Therefore failure to comply with the requisite provisions relating to procedure will render any outcome or decision illegal and unconstitutional. At the Federal level for instance, the mode and procedure for exercising legislative powers is covered by Section 58 of the Constitution. The power to make laws for the Federation shall be exercised by the National Assembly through bills passed by both the Senate and the House of Representatives and assented to by the President subject of course to the power of the National Assembly to override the President's veto.²³

A bill for an Act of the National Assembly may originate in either of the two Houses. The bill will also not become law unless it has been passed and, except a money bill,²⁴ assented to in accordance with the provisions of the Constitution.²⁵ Under section 58(3), where a bill has been passed by the House in

21. See generally D.A. Guobadia, "The Legislature and Good Governance under the 1999 Constitution" in Ayua I.A., *et al* (ed.) *Nigeria: Issues in the 1999 Constitution*, NIALS, Lagos, 2000, pp. 43-75.

22. Section 4.(5)

23. Section 58(1). *ibid*.

24. Money bills are given a different nomenclature from ordinary bills. Indeed the procedure for passage of money bills is governed by section 59 of the Constitution.

25. Section 58(2) *ibid*.

which it originated, it shall be sent to the other House. Once passed by that other House and agreement has been reached between the two Houses on any amendment made on it, the bill shall be presented to the President for assent.²⁶

Generally, there are about eight major stages that a bill must go through before it becomes an Act of the National Assembly. This may be summarized as follows: First, a bill has to be sponsored by the Executive, the Judiciary or the Legislature. Individuals not being members of any of the arms of government or even organizations such as non-governmental organizations may also sponsor a bill for an Act of the National Assembly. The process may commence in either of the two Houses of the National Assembly.

The second stage is for the bill to go through the *first reading*. The *first reading* of the bill is a formal introduction of the bill without debate by the person presenting it or the person moving it on behalf of the person or association presenting it. When the bill is so read, it is recorded in the journal of the House for record purposes. A date is then fixed for *second reading*.

The third stage is the *second reading* of the bill. At this stage, the legislative procedure allows a general debate on the bill. The *committee stage* is the fourth stage of the bill. Here the committee may be *the committee of the whole House* or *the standing committee*.

The fifth stage is *the report stage*. At this stage the report of the Committee together with their recommendations and observations are presented to the whole House. After this the recommendations of the Committee are subjected to debate among the members. Once the recommendations are debated and accepted, the bill is taken as having been passed by the House concerned. This is the sixth stage of the process. The next stage which is the seventh is the passage of the bill by the other House. The eighth and the last stage is assent of the president.

26. Section. 58(3) *ibid*.

If and when a bill is presented to the President for assent, the President is under constitutional obligation, to within thirty days either give the assent or indicate withholding of the assent²⁷. Once the President gives assent, the bill becomes law. Subsection 5 of section 58 of the Constitution gives a direction as to the steps to take where the President withholds assent. Thus, *where the President withholds assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.*²⁸ Over time, the actual construction of this provision has constituted a source of concern. For instance, what is meant by the bill is "again passed" within the meaning of section 58(5) of the Constitution? Will this mean a repeat of the whole process or something near to that? Will a mere motion suffice in the instant case since the bill has gone through the requisite procedures before it was sent to the President for assent? Is the requirement of two-third majority with reference to the entire members of the two Chambers of the National Assembly or referable to those present and voting?

Federal Legislative Actions and the Constitution

All actions of the National Assembly must be within the purview of the Constitution. Thus any action or exercise of power or discharge of responsibility that fails to comply with the provisions of the Constitution is deemed void and will be declared unconstitutional.²⁹

The responsibility for declaring an act constitutional or otherwise is essentially that of the court of competent jurisdiction. This means therefore that while it is open to individuals to postulate and argue as to whether or not an action of any organ of the government is outside the provisions of the Constitution, it is the court of competent jurisdiction that finally

27. Section 58(4) *ibid.*

28. Section 58(5) *ibid.*

29. See section 1 Constitution of the Federal Republic of Nigeria, 1999.

determines, for all practical purposes, that the Constitution has indeed been violated. It is pertinent to state, as we have so stated elsewhere³⁰ that judicial powers are exercisable only in respect of justiciable matters – matters of a legal nature as opposed to hypothetical or matters that are essentially academic in nature.

The court will only intervene in respect of live issues rather than imagined or concocted situations. For instance, the Judiciary will intervene on a complaint by a citizen that the government has violated a law of the land subject, of course, to the provision that judicial intervention is not validly excluded by the law in question or any other law for that matter. The court will also intervene in a legal dispute if it affects a legal right of an individual or relations of that individual.

From these propositions flow the following; first the court will not by itself commence an action on a matter irrespective of how popular the matter may be in the media or irrespective of how important the matter is considered for the society. Thus the court must be moved. The jurisdiction of the court must be invoked before it can intervene. Second the intervention of the court must be sought by or on behalf of the person whose legal rights has been violated. Third, the court will intervene only with respect to real (as opposed to hypothetical situations) and legitimate disputes. Lastly, a person seeking judicial intervention in a matter must prove that he and/ or his relations has/have suffered or may suffer injury as a result of the violation of rights complained of.³¹

Any opinion that may be expressed by an individual on the constitutionality of an act is personal to that individual. It is in-

30. Dele Peters, "Political Reform and Economic Recovery in Nigeria: The Roles of the Bar and the Bench" Ayua I.A. & Guobadia D.A. (eds) *Political Reform and Economic Recovery in Nigeria*, Nigeria Institute of Advanced Legal Studies Lagos 2001 pp 247 – 278 at p.263.

31. See Hon. Justice M. L. Uwais, GCON; *The Role of the Supreme Court in the Evolution of Constitutionalism in Nigeria* NIALS 1st Fellows Lecture, Nigerian Institute of Advanced Legal Studies, Lagos 2006

material the position occupied by the personality concerned be it within or outside the Judicial arm of government. For the court is the guardian, the watch-dog and interpreter of the constitution. The Constitution confers the judicial powers of the federation on the courts. The Constitution in addition lists the hierarchy of the various courts in the country. In interpreting the provisions of the Constitution, the courts have over the years laid down certain principles of constitutional construction with a view to ensuring that the necessary intention of the Constitution is not jettisoned.

The duty of the court to ensure that no tier of government exceeds its constitutionally allocated powers. In doing this, the court endeavours as much as possible to assemble or gather the intent and spirit of the Constitution. In the words of Seervai:³²

“A court of law gathers the spirit of the Constitution from the language used, and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed according to well - established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot limit upon any notion of the spirit of the Constitution.”³³

The Courts have over the years laid down guiding principles, which are often followed in construing the provisions of the Constitution. Without necessarily going into a detail examination of these principles it suffices to bring to the fore the attitude of the Supreme Court which is the Apex Court to the

32. H.M Seervai; *Constitutional Law of India; A Critical Commentary*, Vol.1, 1975, N.M Tripathi, Bombay.

33. *Ibid.* at p. 19.

interpretation of the Constitution. These principles are well reflected in two decisions of the court. In *Nafiu Rabi'u v. The State*³⁴ Sir Udo Udoma, JSC, stated:

“...the function of the Constitution is to establish a framework and principles of government, broad and general in terms intended to apply to the varying conditions which the development of our general communities must involve, ours being a plural, dynamic society, and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles enshrined in the Constitution. ...this court should whenever possible and in response to the demands of justice, lean to the broader interpretation ...It is my view that the approach of this court to the construction of the Constitution should be and so it has been one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this court so as to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”³⁵

Again, and still in relation to the principles of constitutional construction, in *Bronik Motors Ltd v. Wema Bank Ltd*³⁶ the Supreme Court, *per* Nnamani, JSC, observed that:

34. (1981)2 NCLR 293.

35. *Ibid*, at p. 326.

36. (1983)6 S.C. 158

“...a constitutional instrument should not necessarily be construed in a manner and according to rules which apply to Acts of Parliament. Although the manner of interpretation of a constitutional instrument should give effect to the language used, recognition should also be given to the character and origins of the instrument. Such an instrument should be treated as *sui generis* calling for principles of interpretation of its own suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.”

The courts in Nigeria have often been guided by these pronouncements whenever the court's intervention is sought in relation to constitutional matters.

Before going into the details of the different legislative actions taken by the National Assembly and the positions of the courts in relation to whether or they were constitutional, it is instructive to recall one decision of the Supreme Court on the subject under discussion, but under the 1979 Constitution. The case of *Attorney-General of Bendel State v. Attorney General of the Federation*³⁷ is of reference here. In this case, the President had in October 1980 presented the Allocation of Revenue (Federation Account etc) Bill, 1990 to the National Assembly for consideration and enactment. The bill was passed by the Senate on the 15th of January 1981 and by the House of Representatives on the 22nd of January of the same year. Subsequently, it was passed by the Joint Committee on Finance of the National Assembly on the 29th of January 1981 after which the President assented to it on 3rd of February 1981.

The appellant instituted this action pursuant to section 212 of the 1979 Constitution and argued *inter alia*:

- i. that the Bill which the President assented to was not passed by the National Assembly but by the Joint Committee on Finance;
- ii. that a Bill referred to the Joint Committee of the National Assembly cannot lawfully be presented to the President for assent until after each House had considered the Bill, as amended by the Joint Committee and passed the same and
- iii. that the *Allocation of Revenue (Federation Account etc) Act* was unconstitutional and void not having been passed by the National Assembly as required by law.

The Supreme Court held that the Bill assented to by the President was not passed by the National Assembly, and hence unconstitutional. In its judgment, the court *per* Fatayi Williams, CJN, said:

“The so called resolution of differences is no more than a substitution by the Joint Finance Committee, of its own version of the Bill, passed by its members by a slight majority of two votes. I am unable to accept this as a resolution of the differences between the version passed by the Senate and that passed by the House of Representatives. Be that as it may, one thing is clear from the procedure adopted and that is that the Bill has not been passed by the National Assembly as provided for in the Constitution. My interpretation of the provisions of section 55 subsection (2) and (3) read together with sections 54 and 58 is this. If a joint finance committee to which a money-bill has been referred fails to resolve the differences between the two Houses over the bill, the differences should be resolved by

voting at a joint session of the two Houses. If on the other hand, the Committee succeeds in revolving the differences, the new version of the Bill which will show how the differences have been resolved should be sent back to each of the two Houses for adoption. That is the only path of true parliamentary democracy.”

The learned Chief Justice of Nigeria concluded as follows:

“By virtue of the provisions of section 4 sub - section (8) of the Constitution, the courts of law in Nigeria have the power, and indeed, the duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural as laid down in the relevant provisions of the Constitution. If there is any such infraction, the court will declare any legislation passed pursuant to it unconstitutional and invalid.”

The Independent Corrupt Practices and other Related Offences Act 2000

The case of *A.G Ondo State v. A.G Federation*³⁸ was the first in which the constitutionality of the exercise of legislative powers by the *National Assembly* was questioned and challenged. The case presented the Supreme Court with diverse constitutional issues of fundamental concern. Some of the issues raised impinged on the cardinal principles of Nigeria’s federal system. The case raised, among others, the question as to the limit of the exercise of legislative powers allocated to the National Assembly and the State Houses of Assembly; the extent to which the National Assembly could legislate for peace, order and good government of Nigeria and any part thereof and generally the attitude of the court to a legislation some of whose sections are constitutional while some others are unconstitutional.

The fulcrum of this case was the constitutionality of the Independent Corrupt Practices and Other Related Offence Act 2000. The appellant had sought *inter alia* a declaration by the Supreme Court that both the Act and the Commission established under it were unconstitutional.

It was argued for the appellant that the *ICPC Act* was not in respect of a matter or matters either in Exclusive Legislative List or the Concurrent Legislative List and therefore unconstitutional and that the National Assembly has no power to make law with respect to the criminal offences contained in the Act.

The Supreme Court declined to declare the ICPC Act entirely unconstitutional. Rather the *Full Court* of seven Justices unanimously granted the plaintiff's claim in part. The Court considered different sections of the Constitution *vis-à-vis* the endemic nature of corruption and its devastating effects both on Nigerians and the Nigerian economy as well as the Nigerian nation among the Comity of Nations. The pronouncements of the Court in this case aptly evinced the position of the Court. The first is in the leading judgment of Uwais, CJN, (as he then was) as follows:

“It is submitted that ‘corruption’ is not a subject under either the Exclusive or the Concurrent Legislative Lists and therefore being residual matter, the National Assembly has no power to legislate upon it. This submission overlooks the provisions of section 4 subsection (4) of the Constitution which provide that the National Assembly has the power to legislate on any matter with respect to which it is empowered to make law in accordance with provisions of the Constitution. Section 15 subsection (5) directs the National Assembly to abolish all corrupt practices and abuse of power. The question is how can the National Assembly exercise such power? It can only do so

effectively by legislation. Item 67 under the Executive Legislative List read together with the provisions of section 4 subsection (2) provides that the National Assembly is empowered to make law for peace, order and good government of the Federation and any part thereof. It follows, therefore, that the National Assembly has the power to legislate against corruption and abuse of office even as it applies to persons not in authority under public or government office. For the aim of making law is to achieve the common good.”³⁹

The Court emphasized that it was conscious of the history of corruption in Nigeria and should not be at liberty to construe the ICPC Act or any Act of the National Assembly by the motives which influenced the Legislature. However, it acknowledged that when the history of the law and legislation tells the court what the policy and object of the legislature were, the court is to see whether the terms of the Act are such as fairly carry out the policy and objective⁴⁰. On the general legislative intendment of the ICPC Act, Uwaifo, J.S.C said:

“The purpose and mission of the Act are clear. The Act is meant to make justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power; it is to hearken to national and international concerns over corruption; it is to give a national leadership and impetus to the crusade while not standing in the way of the States; it seeks among other things, to deal with and punish specific offences on corrupt practices even

39. Page 306. *ibid*.

40. At p, 338 per Ogwuegbu, J.S.C. citing *Holes v. Guy* (1877) 5 Ch.D 901 at 905 *Knowlton v. Moore* 178 U.S 41, 205ct. 747 at 768 *Bronik Motors Ltd & or v. Wema Bank Ltd* (1988) NCLR Vol 61 and *Re: Anti-Inflation Act* (1976) 9 NR

including those committed outside Nigeria by citizens and persons granted permanent residence in Nigeria; see section 66. It is not in any way an attempt to embark on a general criminal law legislative jurisdiction. The eradication of corrupt practices and abuse of power will ensue to the good government of Nigeria."⁴¹

Ejiwunmi, JSC viewed the importance of the ICPC Act from the perspectives of its linkage with the provisions of Chapter II of the Constitution. It was His Lordship's opinion that the Act was enacted to implement the provisions of the Fundamental Objectives and Directive Principles of State Policy. His Lordship said:

"I must with the greatest respect to the learned senior counsel for the plaintiff reject the contention that offences were invalidly created the said Act. It must be remembered that the Act created in the Independent Corrupt Practices and Other Related Offences Commission which has obviously no power to legislate but having regard to the fact that the Independent Corrupt Practices and Other Related Offences Commission is charged with the power to implement the Fundamental Objective and Directive Principles of State Policy by virtue of the provision of Item 60 (a) it is necessary for the Independent Corrupt Practices and Other Related Offences Commission to be equipped with what would be required to enforce the said Directive Principles."⁴²

The court noted that by virtue of section 4(1) of the 1999 Constitution, the power to legislate for the peace, order and good

⁴¹. At p 417.

⁴². At p 418.

ment of the Federal Republic of Nigeria is vested in the Assembly. This power is with respect to any matter in the Exclusive Legislative List which is set out in Part II of the Second Schedule to the Constitution.⁴³ The court has acknowledged instances where a local problem in a State might assume such a proportion as to require the attention of the federal legislature. As Uwaifo, JSC stressed.⁴⁴

"As *Helvering v. Davis (supra)* and *Heart of Atlanta Motel v. United States (supra)* aptly demonstrate, there may be occasion, and probably always would, when what appears to a local problem assume such a proportion as to become a matter of concern to a federal country as a whole. In such a case it may turn out to be inevitable to regard that matter as affecting the peace, order and good government of the country which ought to be addressed by means of a uniform law. The separate components of the federation may feel or be deemed able to pass laws to deal with the problem within their jurisdiction. In effect, however, that may be very unsatisfactory."

All Justices who sat on the case justified the enactment of the law by the National Assembly and the establishment of the Commission under it. According to Uwaifo, CJN, (as he then said) "Corruption is not a disease which affects public officers but society as a whole. If it is therefore to be eradicated completely, the solution to it must be pervasive to cover every part of the society."⁴⁵ Yet, another Justice⁴⁶ enthused that,

⁴³Section 4(2). *Ibid*
page 407. *ibid*.
page 306. *ibid*.
⁴⁴Uwaifo, JSC.

“The ICPC Act is an enactment for the peace, order and good government of the Federal republic of Nigeria. Any legislation on corruption and abuse of power must be of concern to every Nigeria notwithstanding that its operation will affect property and civil rights for the citizens in a State. Such an enactment like all enactments of the National Assembly will be of paramount force.”⁴⁷

The Supreme Court having reviewed the whole of ICPC Act held *inter alia* that Section 26(3) of the Act which prescribes that prosecution of an offence be concluded and judgment delivered within 90 days of commencement of the prosecution is unconstitutional, null and void in that it infringes on the principles of separation of powers. The court also noted that it was a direct interference with the judiciary by the National Assembly as to when the court should conclude particular matter.⁴⁸ The court in addition declared section 35 of the Act which empowered the Commission to arrest and detain a person indefinitely, until the person complies with the summons unconstitutional, null and void on the ground that that the provision violated the section 35 of the Constitution of the Federal Republic of Nigeria, 1999 relating to fundamental right to personal liberty.

We must note that although the constitutionality of the statute in question was challenged and while the court did not find the whole of the statute constitutional it also did not hold the entire legislation unconstitutional. Applying the *Blue Pencil Rule*⁴⁹ the court unanimously declared the offending sections

⁴⁷. At pages 339-340. *ibid.*

⁴⁸. The cases of *Unongo v. Aku* (1983)2 SCNLR 332 and *A.G., Abia v. A.G. Federation* (2002)6 NWLR (pt. 763) 264 were referred to.

⁴⁹. The *Blue Pencil Rule* states to the effect that where only some portions of a legislation are unconstitutional or bad and the rest is not affected, so that the good can be severed from the bad, the court would not invalidate the whole of the Act, but apply the rule to strike out only the portions affected.

unconstitutional, null and void and held the remaining sections to be constitutional.

Electoral Act 2002

The process leading to the enactment of this legislation was fraught with some controversies. While the President's assent was withheld, the *national Assembly*, by "a motion to override" purported to have dispensed with the constitutional requirement of presidential assent. The constitutionality of the Act was thus called to question in *The National Assembly v. The President of the Federal Republic of Nigeria & 2 Others*.⁵⁰ In this case, the power of the National Assembly to make laws for the peace, order and good government of Nigeria was questioned with regard to the enactment of the Electoral Act 2002. Just like the case with the ICPC Act, the crux of the matter bothered on the procedure adopted for the passage of the law.

The facts of the case were as follows: Sometime in 2002, the Electoral Act 2002 was passed by the House of Representatives and transmitted to the Senate for concurrence. The Senate passed the Bill on 26th February, 2002 with some amendments and transmitted same back to the House of Representatives. The amendments on the Bill were agreed upon and adopted and the Bill was transmitted to the President on the 24th of June 2002 for his assent. On the 25th and 26th of September, 2002 respectively, the National Assembly by motion of veto over-ride purportedly passed the Bill into law because 30 days had lapsed and the President had failed to assent to the Bill.

The 3rd respondent is the body conferred with constitutional responsibility to conduct elections in Nigeria. This body was aggrieved with the passage of section 15 of the Electoral Act 2002 in relation to fixing of time and dates of conduct of elections into the office of the President and the National

Doherty (1963)2 SCNLR 155 and *A.G. Abia v. A.G. Federation* (2002)6 NWLR (Pt.763) 264.

50. (2003)9 NWLR 104.

Assembly along with Governors for each of the States of the Federation among others.

In an *originating summons*, the 3rd Respondent enquired from the Federal High Court, Abuja the following:

- a. whether the appellant can competently enact section 15 of the Electoral Act 2002 when there are adequate constitutional provisions on the matter
- b. whether the appellant followed the laid down procedure for passing the bill into law.

The 3rd Respondent thus prayed the court for, among other relief, a declaration that section 15 of the Electoral Act, 2002 was unconstitutional; an order setting aside the section and an injunction restraining the appellant and other defendants from giving effect to the Act.

The appellant had contended that in the discharge of its power to make laws for peace, order and good governance of the Federation or any part thereof with respect to election, it duly passed the Electoral Act, 2002 when the 1st Respondent withheld his assent and that it had 2/3 of its members concurring passed the Electoral Act, 2002 by motion of veto over-ride.

The trial Federal High Court found the appellant was properly constituted when it exercised its powers under section 58.5 of the 1999 Constitution to override 1st Respondent veto on the Electoral Act, 2002 and that the Act was validly passed by the appellant. The court however held that section 15 of the Act which encroached on the power of the 3rd Respondent by the Constitution to fix dates for elections was unconstitutional. It therefore set aside the section.

On appeal and cross-appeal to the Court of Appeal, the court was to determine, *inter alia*, whether the *Electoral Act, 2002* was validly passed into law by the appellant by its overriding the veto of the 1st Respondent by 2/3 majority of the two chambers of the

appellant as against 2/3 of all the members by passing the bill by a process of motion.

The *Court of Appeal* in a unanimous judgment read by His Lordship Hon Justice Oguntade (JCA) struck out the appeal in its entirety but allowed the cross-appeal also in its entirety. This judgment is instructive and important in the history of constitutionalism and legislative process in Nigeria. Instructively, the court made a definitive pronouncement on the procedure for the passage of a bill into law generally; the procedure for passing a bill into law in event of neglect, failure or refusal of the President to give assent and the effect where a non-money bill fails to receive the assent of the President.

On the procedure for passing a bill into law, the Court pointed out that:

“...where there is no question of overriding the veto of the President, a bill is duly passed when after the needed three readings in each house, the bill is approved by a simple majority of the members present and voting so long the required quorum, which is one-third of the membership of each house, is present.”⁵¹

In construing the provisions of section 58(5) of the Constitution the court stated that a mere motion to override the veto was not sufficient to dispense with the requirement of assent of the President to complete the process of passing a bill into law. Thus according to the court, the requirement of section 58(5) was not satisfied until the Bill passes through all the stages it went through first before it was sent to the President for assent and the repeat passage must be by two-thirds majority of the total number of members in each House of the National Assembly. It stressed further that the requirement of $\frac{2}{3}$ majority is with

51. Page 146 *per* Oduyemi, JCA.

reference to the entire members of the *Senate* and the *House of representatives*.

The court explained the rationale for the repeat of a legislative process in this regards in the following words:

"a repeat of the process is meant to give the electorate of the members of the respective houses and particularly all the interested bodies who contributed to the emergence of the bill during the earlier passage of the bill as well as the public an opportunity to know the amendments proposed by the President and air their views thereon which may influence the National Assembly on the third reading of the bill if it again gets to that stage or to drop the bill in difference to the views of the President and the public opinion."⁵²

Interestingly, even though the court acknowledged the fact that the proper procedure was not complied with in the passage of the Electoral Act, it however refused to declare the whole legislation unconstitutional. For according to the court, *to declare it unconstitutional and strike down at this stage may lead to widespread disruption of national life ...*⁵³ It however declared section 15 of the Act which infringed the powers conferred upon the 1st Respondent by the Constitution to fix dates and time for the conduct of elections unconstitutional.

This case is strictly speaking meant to assist in the development of legislative process in the country under a written constitution – the proper approach to law-making. Importantly, it has pointed out the limit of the legislative powers within the Constitution, the proper approach for exercising those powers and the fact that even the National Assembly must respect and

⁵². *Ibid per Oduyemi*, JCA at p. 150.

⁵³. At p. 134 *ibid*.

off constitutional powers and responsibilities conferred on other arms or agencies of the government.

Conclusion

This chapter has examined the constitutionality of some of the actions taken by the *National Assembly*. Bearing in mind the fact that the major role of the legislature in governance is law making, the discussion has focused largely on some of its legislative actions the constitutionality of which the courts have been called upon to determine. This examination has brought to the fore first of all the fact that the *National Assembly* in exercising its powers under the Constitution must take adequate cognizance of the doctrine of *separation of powers* and respect the powers constitutionally allocated to other arms of government. Second, and equally very important, the fact that the *National Assembly* or any other legislative house for that matter can only legislate bearing in mind the supremacy of the Constitution and its binding force over all institutions and agencies of the government. Third, in legislating, procedural matters especially as laid down by the Constitution must be followed to the letter otherwise non-compliance may be tantamount to effort in futility. One can only express optimism that indeed those constitutionally charged with this responsibility would have learnt some lessons in both substantive and procedural matters involved in law making and the imperative of ensuring due compliance with them.

THE CONTEMPT POWERS OF THE LEGISLATURE

by

Izevbuwa Kehinde Ikhimiukor

*(Research Fellow,**Nigerian Institute of Advanced Legal Studies)***Introduction**

The Constitution of the Federal Republic of Nigeria 1999 (hereinafter, the 1999 Constitution) establishes an Executive Presidential System of Government. This is characterised by the doctrine of Separation of Powers, which provides for three arms of Government – the Legislature, the Executive and the Judiciary.¹ The Constitution vests legislative powers in the National Assembly and each House of Assembly in the States. The executive powers are vested in the President and the Governors of the States individually. And judicial powers are exercised by the Judiciary.²

The Legislature,³ aside from its lawmaking functions, has certain other constitutionally assigned roles, one of which is its investigative roles contained in sections 88 and 128 of the Constitution.⁴ For effective functioning and discharge of its constitutionally assigned roles, the legislature and its members enjoy certain rights known as “legislative privileges” in Nigeria

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1. See generally Hon. Justice Akinola Aguda: “The Functions of the Judiciary and the Separation of Powers under the Constitution of the Federal Republic of Nigeria” in *1999 All Nigeria Judges Conference* : Lagos, MIJ Publishers 2000, p. 2-7
 2. See sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria.
 3. Professor D. A. Guobadia: “The Legislature and Good Governance Under the 1999 Constitution” in *Ayua, I.A. et al (eds): Issues in the 1999 Constitution*, Abuja NIALS, 2000, p. 45. Legislative activities include the oversight functions; investigative functions; the legislature’s powers and duties with regard to public finance and its educational role subsumed under its responsibility to its constituency.
 4. 1999 Constitution.

and in other Commonwealth nations⁵ "parliamentary privileges." incidental to privileges enjoyed by the Legislature and its members collectively and individually, are the powers to enforce these privileges and maintain the dignity of Legislative Houses. Without the concomitant power to enforce its privileges, the rights enjoyed by Legislative Houses would be rendered nugatory. Indeed the power of a Legislative House to enforce its privileges is in itself a privilege of the House. The sum total of powers exercisable by the Legislature in enforcing its privileges and maintaining orderly conduct within the House and its precincts come within the rubric of the Legislature's "Contempt Powers." The rationale behind the vesting and exercise of these powers is to maintain the dignity and image of the Legislature as a body and an arm of Government. The power to punish for contempt is inherent in all Legislatures.

This Chapter discusses the contempt powers of the Legislature in Nigeria drawing largely from the practice and application in other jurisdictions.⁶ The contempt powers of the Legislature are intertwined with "legislative privileges" and the "investigative powers of the Legislature." Thus, a meaningful discourse of the contempt powers of the Legislature must of necessity incorporate "legislative privileges" and the "investigative powers of the Legislature." It is against this backdrop that the contempt powers of the legislature are examined - first, as ingrained in the concept of "legislative privileges" and secondly as embedded within the "investigative powers of Legislative houses" in Nigeria.

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5. The United Kingdom, Canada, Australia and India operate a parliamentary system of Government and their Legislatures are referred to as Parliament. Accordingly, the concept of "Legislative Privilege" is referred to as "Parliamentary Privileges" in their Legal and Political systems.
 6. "Legislative Privileges" is an English concept that has been transposed and adopted by a number of Constitutions. It is therefore apposite to examine the practice in countries that have adopted this Practice as part of their Legislative practice. In this Chapter the analysis is confined to the practice in the United Kingdom, India, Australia and the United States.

Historical Development of Privileges

The concept of "Legislative privileges" or "Parliamentary Privileges" has its roots in the practice and procedure of the English Parliament. It evolved over time⁷ vesting individual and collective rights on the English Parliament and its members. The rights vested were and are still pivotal to the effective functioning of the English Parliament and all Legislatures that have adopted the practice. Erskine May⁸ defines "Parliamentary Privileges" as:

"The sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by members of each House individually without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."

The practice of "Parliamentary Privileges" in "England could be traced back to the period, when the Speaker of the English Parliament claimed the privileges for himself alone. From this stage, 'Parliamentary Privileges' developed steadily and progressively to the Speaker demanding in general terms to speak the mind of the Commons during the reign of Henry IV. By 1536, the English Parliament was demanding the privilege of access to the Crown, followed by demand for freedom of speech in 1541 and by 1554 the three privileges of access to the Crown, freedom of speech and freedom from arrest were demanded by Parliament. By the end of the sixteenth century these privileges had 'crystallised' into an acceptable parliamentary practice in England."⁹

The privileges of the House of Commons include freedom of speech in debate, freedom from arrest, the right to exclude

7. O. Hood Phillips & Paul Jackson: *Constitutional and Administrative Law*: London, Sweet and Maxwell 6th ed. 1978 p.234.

8. Erskine May: *Parliamentary Practice*: London, Butterworths 20th ed. 1983 p.70

9. Maurice L. Gwyer: *Anson's Law and Custom of the Constitution*: London, Oxford Clarendon Press Vol.1 Parliament 5th ed. 1922 pp. 153-154, 162.

strangers from the House and its precincts, the right to retain publication of reports of the House proceedings and the right to regulate its own proceedings. The privileges of the House of Commons which are enforced through the officers of the House are categorised into two groups. The privileges within the first group are those privileges specifically demanded by the speaker on behalf of Parliament at the beginning of each Parliamentary Year. The privileges of freedom of speech and freedom from arrest come within this group. In the latter group are those not specifically demanded by the House but enforced by it and they include the privileges to regulate its own proceedings and to enforce its privileges.¹⁰ The House of Lords equally enjoys these privileges mentioned. It however, does not have to go through the motions of claiming the privileges like the House of Commons at the beginning of each Parliamentary year.¹¹ Consequently, each House¹² in England is empowered to enforce its privileges and to punish as contempt breaches of its privileges by its members or strangers.

The English Parliament not only punishes breaches of its privileges as contempt; it punishes acts which range from disobedience to its lawful commands to acts calculated to undermine its authority as contempt. It is instructive to note that, there is no generally acceptable definition of contempt. This is not unconnected with the fact that the class of acts that gives rise to contempt are not closed. Contempt covers a wide range of acts that cause an affront to the dignity of a Legislative House or obstruct it in the discharge of its functions.

The powers of the English Parliament to enforce its privileges, uphold order within the House and its precincts and commit for contempt those who undermine its authority or

10. *Ibid.*

11. Maurice L. Gwyer *op. cit.* p. 241.

12. The English Parliament is made up of the House of Commons (the lower House) and the House of Lords which sits in dual capacity both as a Legislative House and as a Court.

breach its privileges were summed up by Parke B in *Howard v. Gibson*¹³ in the following words:

"The House has power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even disobedience we need not inquire), to bring them into custody to the bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to amend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge: and further, the House, and that alone, is the proper Judge when these powers or either of them are to be exercised."

The differences between "parliamentary privileges" and contempt are not easily drawn for a number of reasons chief of which is the overlap between the two concepts and the procedure for punishing same. Breaches of "parliamentary privileges" leads logically to contempt of the legislature. In addition, there is a convergence between the procedure for committing those who breach "Parliamentary privileges" and those who commit acts of contempt before the House or its precincts. "Breaches of Privileges" come within the larger nomenclature of acts that are contemptuous in nature.¹⁴ Thus, all breaches of privileges vested on members of the English Parliament are treated as contempt. It is pertinent to note that not all acts of contempt arise from "breaches of parliamentary privileges." However, "Parliamentary Privileges" and its overlap with contempt have been incorporated

13. (1845) 10 Q.B. 451.

14. Eyimofe Atake: *Contempt in the Face of the Court*: Lagos, Eyimofe Atake and Co. 1992, p.6.

into the practice in Nigeria and former British colonies that have adopted the practice.

Parliamentary Privileges or Legislative Privileges

The concept of "Legislative or Parliamentary Privilege" has been adopted by several erstwhile colonies of the United Kingdom. It is now an integral component of their legislative practice. In Australia,¹⁵ Canada,¹⁶ the United States of America,¹⁷ India¹⁸ and Nigeria,¹⁹ the Legislature enjoys the privileges accruing to the British House of Commons as well as its concomitant power to punish for contempt.

Australia

In Australia, both the federal and States Parliament enjoy the same privileges with the English House of Commons. However, the Constitution of South Western Australia limits the privileges of its Parliament to those in operation in United Kingdom as at 1858.²⁰ This limitation is only applicable to the South Western

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15. See Bryan Palmer, Palmer 02Politics at <http://www.02politics.info/lex/parl.htm>, accessed on the 05/06/2004.
 16. Per l'Heureux-Dubé, Gonthier, McLachlin and Lacobucci JJ in *New Brunswick Broadcasting Co. v. Nova Scotia Speaker of the House of Assembly* (1993) 1 S.C.R 319 in <http://www.canlii.org/ca/cas/sc/1993/sc10.html> accessed on the 19/05/200. The Constitution of the United Kingdom recognised certain privileges in the British Parliament since the Canadian legislative assembly was modelled on the parliamentary system of the United Kingdom they possess similar, although not necessarily identical powers.
 17. Carl Beck: *Contempt of Congress*: United States America DACAPO Press, 1974, p. 3.
 18. See Articles 105 and 194 of the Indian Constitution in Appendix of H.M. Seervai, *Constitutional Law of India*: Delhi, Universal Book Traders 4th ed. Vol.1, 2002.
 19. See the Legislative Houses Powers and Privileges Act Cap 208 LFN 1990: Standing Rules of the Senate 2001 and Rules of the House of Representatives 2003.
 20. Ian Davis, "Clerk of the House in Parliamentary Privilege" - first report- <http://www.Parliament.the-stationery-office.co.uk> accessed on the 19/05/2004.

Parliament and does not affect²¹ the other States Parliaments or the Federal Parliament in Australia.

The exercise of contempt powers by the Legislature in Australia²² was in issue in the early case of *R v. Richards ex parte Fitzpatrick and Browne*.²³ The facts of the case were that Frank Browne a journalist, and Raymond Fitzpatrick the proprietor of the Bankstown Observer, were charged before the bar of the House for breach of parliamentary privilege. They had published articles attacking the Labour Member for Reid, Charles Morgan, who had been a former business associate of Browne's. The House found them guilty of a serious breach of privilege by publishing articles intended to influence and intimidate a member's conduct in the House. They were given a three month jail term. On application to the High Court, the court in dismissing their appeal held that the Houses of Parliament were empowered under section 49 of the Australian Constitution, to imprison people they find guilty of contempt.

In 1987, the Australian Federal Parliament passed the Parliamentary Privileges Act²⁴ which sets out the scope and limits of Parliament's contempt powers. The Act reaffirms the application of the powers, privileges and immunities of each House of Parliament and its members in section 49 of the Australian Constitution. The Act in section 6(1) abolishes contempt by defamation arising from words or acts that defame Parliament, Committee or its members. The provision of section 6(1) is qualified by sub-section 2 which eliminates words or acts which are spoken in the presence of a House or its committees. Under the Act, each House may impose penalties for

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21. Australia is a federation of six states with each of the states having their own Constitution and State Parliaments; so in certain instances there are slight variations in the application of certain principles.
22. Bryan Palmer Ozpolitics at <file:///E:/Ozpolitics-info.htm> accessed on 19/05/2004.
23. (1955) 92 CLR 157. See also <file:///E:/Parliament of Australia senate Publications Odgers Guide to Australian> accessed 19/05/2004.
24. Act No. 21 of 1987 as amended.

contempt limited to imprisonment not exceeding six months for a person²⁵, or a fine not exceeding \$5,000, or not exceeding \$25,000 in the case of a corporation.²⁶ The imposition of penalties by the Legislature for acts of contempt committed against it is now subject to judicial review under the Act. This Act also prevents members of Parliament from being expelled.²⁷

India

The Indian Constitution (59th Amendment Act 1988) in Articles 105 and 194,²⁸ spells out the powers, privileges and immunities of the Federal and State Parliament and its members thus:

...Subject to the provisions of this Constitution and to the Rules and standing orders regulating the procedure of the Parliament, there shall be freedom of speech in Parliament.

No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof, and no person shall be so liable in respect of the publication by or under the authority of Parliament of any report, paper, votes or proceedings...²⁹

These privileges are part of English Parliamentary practice, which have been adopted in former British colonies. Consequently, the privileges of the Indian Legislature are a rehash of the English Parliamentary privileges to wit - freedom from civil arrest, the privilege of excluding strangers from the House and right to retain publication of its proceedings.

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25. Section 7(1).
 26. Section 7(5).
 27. Section 8.
 28. H.M. Seervai Vol.1 *op cit.* appendix.
 29. Article 105 of the Indian Constitution.

In the Indian case of *Pandit M.S.M. Sharma v. Shri Krishna Sinha*,³⁰ a House of the Bihar Legislature had directed certain parts of its proceedings to be expunged. The Petitioner, however, published a full account of the proceedings. The Bihar Legislative house subsequently issued a notice to the petitioner to adduce reasons why steps should not be taken against him for breach of privilege of the House to prohibit publication of proceedings. The petitioner thereafter filed a petition under Article 32 asserting his fundamental right of freedom of speech under Article 19(1)(a) in pursuance of which he averred that the House had no right to take proceedings against him. It was held that the House possessed the privilege of prohibiting publication of its proceedings and was not subject to the fundamental rights of a citizen.

In recent times, the exercise of the contempt powers by the Legislature in India has come under criticisms. In 2003,³¹ on November 7, the Tamil Nadu Assembly passed a resolution on the Editor, Executive Editor, Publisher and two other senior journalists of the Hindu sentencing them to 15 days imprisonment. The action of the assembly was premised on criticisms of the Legislature in its publication. The Supreme Court however granted a stay amidst criticisms that trailed the actions of the Legislative House.³²

The United States

The American Congress has adopted the Parliamentary Procedure to punish for contempt. However, many of the privileges of Congress are spelt out in the Constitution. The first contempt case in America arose as a result of investigation into alleged bribery by Robert Randall of certain members of the

30. (1959) Supp. (1) S.C.R. 806 in H.M Seervai: *Constitutional Law of India*: Delhi, Universal Book Traders, 4th ed., vol.2, 2002, p.2167.

31. Anupam Gupta "Power and Restraint" in *Frontline*, Vol. 20 - Issue 24, November 22 - December 05, 2003 in <http://www.hinduonnet.com/fl2024/stories> accessed 22/04/2004.

32. *Ibid.*

House. The Sergeant-at-Arms was ordered by the House to arrest him under the authority of a warrant, signed by the Speaker. His request for the right to counsel and time for defence were granted and subsequently found guilty of the offence, he was incarcerated for nine days. Prior to 1857, all contempt cases were punished without reference to statute. In 1857, the American Congress amended the procedure by enacting a statute governing prosecution for contempt.³³

In India,³⁴ Canada and the United States,³⁵ the privileges of the Legislature are spelt out in their respective Constitutions. However, in Nigeria, "legislative privileges" are not contained in our Constitution. Recourse is had to the Legislative Houses (Powers and Privileges) Act,³⁶ the Standing Rules of the Legislature and English parliamentary practice.³⁷

Legislative Privileges in Nigeria

Members of State and National Legislative Houses in Nigeria have been vested with legislative privileges to complement their functions and roles like their counterparts in the English Parliament. Legislative Privilege in Nigeria is regulated by the Legislative Houses (Powers and Privileges) Act 1990.³⁸ "Legislative Privileges" refer to the rights enjoyed by the House collectively and by the members of the House individually conferred by the Legislative Houses (Powers and Privileges) Act 1990 and other statutes, practices, precedents, usages and customs.³⁹

Section 3 of the Act guarantees the freedom of speech, which is one of the most important privileges. The section

33. Carlbeck *op.cit* p. 1- 6.

34. See notes 18 above.

35. See Article 6 of the American Constitution.

36. Cap 208 LFN 1990.

37. Rules of the Senate 2001, Rules of the House of Representative 2003 Order V. (1) (c).

38. Cap 208 LFN 1990

39. Order V Rule 1(a) of the Rules of the House of Representatives, National Assembly Press Abuja, 2003.

provides that no civil or criminal proceeding may be instituted against any member of a Legislative House in respect of words spoken or written before that House or a Committee, or in any petition, bill, resolution or motion or question brought or introduced by him. This privilege helps to secure protection from defamation, slander and any legal action arising from debates in the house. It ensures the active participation of Legislators in matters before the House. This privilege is premised on the need for Legislators to freely express their opinions or convictions on any matter or issue arising before the House. It is also important for members of Legislative Houses to carry out their duties without the fear of harassment or the threat of law suits from their utterances and contributions to debates on the Floor of the House hanging over their heads. The right to freedom of speech however, does not cover utterances made by Legislators outside the scope of their duties or outside the precincts of the Legislative Houses.

The Court of Appeal upheld the existence of the privilege in *Ezeoke (Speaker of the Federal House of Representatives) v. Makarfi*⁴⁰ where Nasir JCA stated:

“Section 3 deals with the immunity of members from proceedings in respect of words spoken before the Legislative House and words written in reports to the house or to a committee of the House. In view of what I have stated in respect of the powers and privileges of the Legislature in this country and other countries, I am of the view that section 3 is not unconstitutional. It is fundamental in a democracy, like our own, that members of the Legislature and those called upon to speak before the Legislature while the House is sitting must be free to express their opinion without any fear of prosecution or any other form of duress. There is

■0. (1982) 3 NCLR 663.

nothing in our Constitution which restricts this inherent right of the Legislature.⁴¹

In sections 4 - 6 of the Act, Legislative Houses are empowered to order the attendance of witnesses to give evidence⁴² and such persons shall be notified of the order through a summons⁴³ and where a summoned person fails to attend, a warrant for his arrest may be issued.⁴⁴ The power of a Legislative house in Nigeria to summon witnesses to appear before it vide a summons under the Act is similar to the powers exercised to compel testimony under sections 88 and 128 of the Constitution . The point of departure between the provisions of sections 4-6 of the Act and sections 88 and 128 of the Constitution are the inherent limits in the lawful exercise of the powers as contained in the provisions of section 88 and 128. In contrast, sections 4-6 of the Act do not set out limits on the powers of the Legislature to summon witnesses before it. The provisions of section 88 and 128 are examined in detail in the discussions on the Investigative powers of the Legislature.⁴⁵

In pursuance of the power of the Legislative House to summon witnesses before the House under sections 4-6 of the Legislative Houses Power and Privileges Act,⁴⁶ certain other offences have been created by the Act in sections 10 -12. Under section 10 of the Act, a person who gives false evidence before a Committee of the House, is guilty of an offence punishable on conviction to imprisonment for twelve months. In section 11,⁴⁷ a person summoned before the House who refuses to answer questions or fails to attend the House on the basis of a summons is guilty of an offence punishable on conviction to a fine of fifty

41. *Ibid* at p. 674.

42. Section 4 Legislative Houses (Powers and Privileges) Act.

43. Section 5 *ibid*.

44. Section 6 *ibid*.

45. See sections 88 and 128 of the 1999 Constitution.

46. Cap 208 LFN 1990.

47. *Ibid*.

naira or imprisonment for three months or both fine and imprisonment. A person who presents fabricated evidence before the House or Committee is guilty of an offence and liable on conviction to a fine of two hundred Naira or imprisonment for twelve months.⁴⁸

The right of a legislative House to exclude strangers during sessions of the house is one of the privileges enjoyed by legislative houses and is guaranteed in sections 14 - 18 of the Act. A legislative House has a right to exclude strangers from the chamber or from within the precincts of the House.⁴⁹ Where a stranger enters the chambers or precincts without permission or is ordered to leave or contravenes any rule under the standing orders of the House or attends a legislative House as a representative of a newspaper or journal after the revocation of permission granted, such a person is guilty of an offence and liable on conviction to a fine of fifty Naira or imprisonment for 3 months or both fine and imprisonment.⁵⁰

Strangers who obstruct members' movement within the chambers or precincts, obstruct officers in the execution of their duty, create or join in disturbance likely to interrupt House sittings and sit or vote in the House are guilty of an offence and liable on conviction to a fine of one hundred Naira or six months imprisonment or both.⁵¹ Section 17 gives power to an officer of a legislative house to arrest any person who commits an offence specified under the provisions of section 15 or 16. Under section 18, strangers may be removed on the order of the President or Speaker of the House. The right of a Legislative House to exclude strangers from the House is an important one and is particularly useful in times when the deliberations of the House are sensitive, bordering on security issues and would be in the

48. Section 12.

49. Section 14.

50. Section 15.

51. Section 16.

interest of the nation not to divulge proceedings from such deliberations to the world.

Section 21⁵² of the Act deals with contempt of a legislative House by its members and lists specific acts of members which may amount to contempt to include publication of evidence taken by a committee member to a non-Committee member before it is reported to the House; assaulting or obstructing a member of a legislative House within the chamber or precincts of the House or assaulting or obstructing a legislative officer in the execution of his duty. The punishment for contempt committed by a member of a Legislative House includes reprimand, suspension and non-payment of salary and allowance during the period of suspension.

Section 24⁵³ punishes persons who publish defamatory statements or writings against a legislative House or any committee, publishes any writing reflecting on the character of the President, Speaker or Committee Chairman on the conduct of his duty or publishes any writing which is a wilful misrepresentation of proceedings of the House or a member's speech. Section 25 criminalises the printing of false copies of laws or proceedings.

Section 31 of the Act precludes the service of civil processes issued by any Court in Nigeria in the exercise of its civil jurisdiction being served or executed within the chamber or precincts of a Legislative House while the House is sitting. The right is necessitated by the need to avoid disruptions of proceedings before the House. The privilege however, does not preclude members of Legislative Houses from liability or arrest where crimes have been committed.

The provisions of section 31 came up for interpretation by the high Court of Lagos state in *Tony Momoh v The Senate of the National Assembly and others*.⁵⁴ The applicant had applied to the court for leave for an order quashing the resolution of the Senate

52. *Ibid.*

53. *Ibid.*

54. (1981) 1 NCLR p.21.

of the National Assembly made on the 5th of February 1980 and contained in an official communication sent to the applicant on the 11th of February 1980. The said Leave was granted and the respondents ordered to be put on notice. The court bailiff in company of the applicant's counsel was prevented from serving the document on the second respondent by his Legal Adviser. At the High Court of Lagos State it was contended by the Legal Adviser to the respondent that the Premises of the National Assembly had absolute immunity against any court process under section 31 of the Legislative Houses Power and Privileges Act then Cap 102 LFN.⁵⁵

The High Court per Ademola Johnson J held that section 236(1) of the 1979 Constitution gives the High Court unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, obligations or criminal proceedings relating to any penalty, punishment or liability in respect of an offence committed by any person. In addition section 42 confers special jurisdiction on state High Courts over chapter IV of the Constitution dealing with fundamental human rights.

The court further held that before a court can adjudicate on a matter within its jurisdiction it should have issued processes to ensure the appearance of the parties to the trial. The service of process is essential to enforcing the rights guaranteed under the Constitution. The Court went on to find the provisions of Section 31 of the Legislative (powers and privileges) Act void and inoperative to prevent the service of court process within the House or its precincts for its inconsistency with section 1 of the Constitution which proclaimed the supremacy of the Constitution and declared void any law inconsistent with its provisions.

The court in interpreting section 31 of the Legislative (powers and privileges) Act in *Tony Momoh's case (supra)* declined to uphold the privilege of restricting service of civil process while the House is sitting. This privilege is recognised

55. 1958.

universally by all jurisdictions that have adopted parliamentary privileges as part of their system.⁵⁶ It has also been opined that the "restriction on service of civil process was not in contravention of the fundamental rights of individuals as the restriction on the face of it only serves to postpone the actual service of court process."⁵⁷

Under the Legislative Houses (Powers and Privileges) Act, the only direct reference to contempt is with respect to contempt of a Legislative House committed by its members. From the foregoing, offences created in sections 10, 11, 12, 14, 15, 16, 24 and 25 of the Act may amount to contempt of the Legislative House. As pointed out by Professor Jadesola Akande,⁵⁸ each House is free to punish any activity, which, in its view, affects the dignity of the House. Generally, any disorderly, contumacious or disrespectful conduct in the presence of either House or its Committees whether by strangers present or by persons acting as witnesses may be punished as contempt.⁵⁹ This position has made the exercise of the contempt powers of the Legislature amenable to criticisms, one of which is its propensity for abuse in that the classification of contemptuous acts punishable by the Legislature is not closed.

The Investigative Powers of the Legislature and Contempt

The exercise of the investigative powers of the Legislature is closely knit to the contempt powers of the Legislature. The power to punish for contempt comes into play when the Legislature in pursuance of its investigative powers compels the

56. See section 6 of the American Constitution which provides among others that Senators and Representatives except in cases of treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses and in going and returning from the place. See also section 14 of the Australian Federal Parliamentary Privileges Act 1987 Act No. 21 as amended.

57. Niki Tobi J.S.C: *The Exercise of Legislative Powers*, NIALS Annual Lecture Series 2002 p. 66.

58. *Introduction to the Constitution of Nigeria*: Lagos, MIJ Publishers 2000, p. 195.

53. Erskine May *op cit* p. 143.

attendance of persons to appear before it or produce relevant documents connected with the subject of its investigations. This power is enshrined in sections 88 and 128 of the Constitution. Section 88 gives the National Assembly power to conduct investigations into:

- (a) any matter or thing with respect to which it has power to make laws; and
- (b) the conduct of affairs of any person, authority, ministry or government department charged, with the duty of or responsibility for
 - (i) executing or administering laws enacted by the National Assembly; and
 - (ii) disbursing or administering monies appropriated or to be appropriated by the National Assembly.

The powers conferred on the National Assembly in section 88(1) are exercisable for the purpose of enabling it to:

- (a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws, and
- (b) expose corruption, inefficiency and waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

At a first glance, the investigative powers vested in the National Assembly in section 88 seem wide and expansive. A closer look however, reveals limitations on the general investigatory powers granted. The exercise of the powers is fettered by the Constitution and inherent limitations within the provisions of section 88. The provisions of section 88 are made subject to the provision of the Constitution in the preambular

Paragraph⁶⁰, in other words, where there is a conflict between the exercise of the powers granted in section 88 and constitutional provisions, the constitutional provisions will prevail. It thus follows that the National Assembly cannot exercise its powers in flagrant disregard of Constitutional provisions such as those for the fundamental rights of individuals as contained in Chapter IV of the Constitution to wit: freedom of expression, free hearing and so on.

Embedded within the provisions of section 88 are limitations on the powers of the National Assembly to conduct investigations. Section 88 envisages two scenarios in which the National Assembly may exercise its investigative powers. The first scenario is when it carries out investigation into any matter or thing with respect to which it can make laws⁶¹ in other words, matters that fall within the purview of its legislative competence. The purpose of such investigation should either be for making laws or correcting defects in existing laws within its legislative competence.

The investigative powers of the National assembly are also exercised to carry out checks on or to monitor the conduct of affairs of any person, authority, ministry or government department charged with the duty of executing or administering laws made by it (under its legislative competence) and disbursing money appropriated or to be appropriated by it. These checks are lawful when they are intended to expose corruption, inefficiency or waste among those charged with administering its laws or disbursing money⁶². Sub-section (2)(b) does not give latitude to the National Assembly to proceed on an investigation to expose corruption or waste in the polity without having recourse to whether the person, authority or government department they seek to investigate come within its legislative competence. In

60. See the opening paragraph of section 88(1).

61. See Parts I and II of the Second Schedule to the 1999 Constitution .

62. See section 88(2)(b) of the 1999 Constitution.

essence, the National Assembly can only proceed with investigation within the scope of its powers.

Section 88 lays out the scope, purpose and limitations of the investigative powers of the Legislature. The Procedure for the exercise of the investigative powers of the Legislature is as contained in section 89 of the Constitution.⁶³ The National Assembly in furtherance of its investigative powers may summon witnesses. The acts of summoned witnesses who fail to respond to lawful summons, refuse to produce documents or answer questions put to them, may be treated as contempt of the House. Therein lies the convergence between contempt process and investigatory powers. Azinge⁶⁴ opines that there is a merger of the contempt process and investigatory powers when the procedure for conducting investigation is put into perspective. Section 89 of the Constitution provides thus:

For the purposes of any investigation under section 88 of this Constitution and subject to the provision thereof, the Senate or the House of Representatives or a Committee appointed in accordance with section 62 of this Constitution shall have power to-

- (a) to procure all such evidence, written or oral, direct or circumstantial, as it may think necessary or desirable and to examine all persons as witness whose evidence may be material or relevant to the subject-matter;
- (b) to require such evidence to be given on Oath;
- (c) to summon any person in Nigeria to give evidence at any place or to produce any document or other thing in his possession or under his control, subject to all just exceptions; and

^{63.} For State Legislatures, see section 129 of the 1999 Constitution.

^{64.} Epiphany Azinge "Contempt Powers of the Legislature" in Umezurike (ed.) *Democracy Beyond the Third Republic*,: Abuja, FMJ, 1993, Vol. 14, p.53.

(d) to issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails, refuses or neglects to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House or the Committee in question, and to order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his failure, refusal or neglect to obey the summons, and also to impose such fine as may be prescribed for any such failure, refusal or neglect; and any fine so imposed by a court of law.

The Powers granted to the National Assembly to procure evidence and summon witnesses in pursuance of section 88 are wide and quasi-judicial in nature. The powers, if not exercised with caution, can be used arbitrarily. The National Assembly can only summon witnesses or obtain documents within the ambit of section 88. The person or document summoned and reason for the summons must have a relevance or nexus to its legislative competence as provided by section 88.

It is contemptuous for persons either as witnesses or under summons before the House to interrupt or disrupt proceedings. Violations of orders made by the House in pursuance of section 89 will also amount to contempt. Generally, Legislative Houses reserve the rights to treat as contempt and penalize accordingly, any act capable of causing disrespect and an affront to the authority and dignity of the House by persons appearing before it.

The exercise of the investigative powers of the Legislature came up for examination under the 1979 Constitution (which is *impari materia* with the 1999 Constitution) in *Tony Momoh v. the Senate*.⁶⁵ The court was called upon to interpret sections 82 and 83 of the 1979 Constitution, which gave the National Assembly

65. (1982) INCLR p. 105.

powers of investigation and summons. The National Assembly acting under this power summoned the applicant to disclose the source of his information in respect of an article about senators lobbying for contracts. The applicant sought to enforce his fundamental right to freedom of expression. The court held that sections 82 and 83 of the 1979 Constitution which conferred investigative powers on the National Assembly were limited to the lawmaking powers of each House of the National Assembly and had no application where the issue involved bore no relevance even remotely to lawmaking and consequently the Senate would be acting *ultra vires* its powers under the Constitution.

The legality of the investigative powers arose under the 1999 Constitution in *EL Rufai v. House of Representatives*.⁶⁶ In that case, the plaintiff/appellant had appeared before a Committee of the House of Representatives who were investigating him as the then Director-General of the Bureau of Public Enterprises. The appellant after his appearance before the Committee had circulated materials which were considered defamatory of the House following this, the Clerk of the House wrote the appellant to compel his attendance before the House to answer questions regarding his conduct before the Committee carrying out the investigation.

The appellant, pre-empting the action of the House, took out an originating summons in the Federal High Court asking the court to determine whether, having regard to the provisions of sections 88 and 89 conferring investigatory powers on the National Assembly, he could be compelled to attend the House on matters pertaining to defamation. He also sought, amongst others, an order setting aside the summons of the House and an order of perpetual injunction restraining the defendants from future issuance of such summons.

The defendant filed a preliminary objection challenging the jurisdiction of the court. The court, upholding the objection,

⁶⁶. (2003) F.W.L.R.(Pt. 173) 162 C.A.

struck out the suit. The Plaintiff thereafter appealed to the court on appeal which struck out the suit. The Court of Appeal held that the Legislature has no general authority to invite citizens to appear before it except as provided in section 88(2) of the Constitution. The court stated further that it cannot assume jurisdiction over matters of the internal proceedings of the House pertaining to an invitation to a citizen to appear before it and particularly where the rights of a citizen has not been materially affected by the invitation. The court held further that whilst it would not interfere in the internal affairs of the House, the court will however, assume jurisdiction where there has been non-compliance by the Legislature with the constitutionally prescribed procedure or a breach of the fundamental rights of the complainant.

There has not been much drama under the 1999 Constitution with respect to the investigative powers of the National Assembly as was the case during the Second Republic. In recent times, however, both Houses of the National assembly have exercised their investigative powers in summoning witnesses to appear before them. As part of the build up to the 2007 general elections, the Independent National Electoral Commission (INEC) chairman, Professor Maurice Iwu has appeared before the Senate and House of Representatives in response to summons over its preparedness and modalities put in place to ensure hitch free general elections. In furtherance of its investigative powers the National assembly has, in the course of investigations into the activities of the Petroleum Technology Development Fund (PTDF), summoned the Vice-President and others to appear before it. Initially, the summoned executives of the Nigerian National Petroleum Corporation (NNPC) and the Department for Petroleum resources (DPR) failed to obey the summons of the National Assembly. The pertinent issue is the efficacy of the power of the House to compel testimony in situations in which the executives fail to appear before the National Assembly. There have clearly been no visible sanctions or steps taken to punish

such wilful disrespect other than outrage by the Legislature decrying the attitude of the Chief Executives.

The *Tony Momoh's case* (supra) and *El Rufai's case* (supra) reaffirm the constitutional powers of Nigerian Legislative Houses to conduct investigations albeit within constitutional constraints or limits. This is in line with the practice of the American Congress. Where it is determined that the investigation is necessary to aid the American Congress in exercise of its legislative functions, the power to compel testimony is invoked. The investigative powers of the American Congress are not expressly provided for in the American Constitution in contrast to the Nigerian Constitution which expressly authorizes the powers of the National assembly to conduct investigations. It is a power which has over time been imputed to the American Congress as being vital to the exercise of its Legislative functions.⁶⁷ In the American case of *Kilbourn v. Thompson*.⁶⁸ the Supreme Court held that no recalcitrant witness could be convicted unless the matter investigated had a direct relation to the legislative functions of Congress.

The exercise of the investigative powers of a legislative house in Australia was played out from 1996 to 1999 in the upper Legislative House of New South Western Australia. The treasurer of the cabinet, also a member of the Legislative Council failed to produce certain documents before the Council citing commercial confidentiality, public interest, immunity, legal profession privilege and cabinet confidentiality as the basis for his refusal. The treasurer was found guilty of contempt. The issues were subsequently litigated in the High Court and the Supreme Court of New South Wales. The Court upheld the power of the Legislative Council to order the production of documents by a member of the House including a minister.⁶⁹

57. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

58. 103, US 168, 190 (1881).

59. *Egan v. Willis and Cahill* (1996) 40 NSWLR 650; *Egan v. Willis* (1998) 73 ALJR 75; *Egan v. Chadwick and Others* (1999) NSWCA 176 revised 04/08/99

Contempt Proceedings

It is impossible to identify or enumerate acts which might be construed as contempt because of the discretionary nature of the power to punish for contempt. From the practice of the English House of Commons, a number of acts amounting to contemptuous acts can be distilled. The following are held by the House of Commons to be contemptuous: misconduct in the presence of either House or Committees of the House; the presence of a member at a Committee when he is not part of the Committee; interrupting or disturbing the proceedings of the House; the appearance of persons in a riotous or disorderly manner before the House to hinder or promote the passing of any bill; refusal of witnesses appearing before the House to be sworn; refusal of witnesses to answer questions or produce documents; the wilful suppression of the truth by witnesses and disobedience to general rules or orders of the House or Committees.

The proceedings⁷⁰ for committing a person for contempt vary according to the circumstances of each case. There are generally two categories of contemnors in contempt proceedings before a Legislative House. A contemnor of a Legislative House may either be a non-member or a member of the House. A non-member of the House may be cited for contempt where he is summoned before a House or Committee to give evidence or produce a document and he fails, neglects or refuses to attend or produce the document required. Contempt may also arise where a non-member acts or conducts himself in a disorderly manner before the House.

In such instances where a privilege has been breached or other acts of contempt committed against the House or its Committee, any member of the House or Committee may rise to speak. The member proceeds to move a motion declaring that a

CA 40828/98 in Graham Spindler: "The Separation of Powers: Doctrine and Practice" in, <http://www.parliament.nsw.gov.au>. Accessed 06/05/2004.

70. See Azinge, *op. cit.*, pp. 57-59.

contempt or breach of privilege has been committed or refers the matter to the Committee on Ethics and Privileges. Where the matter is raised in the Committee of the whole House the Chairman shall leave the Chair on an order to report progress.⁷¹ Where the matter is not referred to the Committee on Ethics and Privileges, the House or committee may, by resolution, cite the contemnor for contempt.⁷²

If a complaint is made against a member, it is followed up with a substantive motion referring to the matter, which has been introduced to the notice of the House. If the Speaker or President of Senate rules that a *prima facie* case of breach of privilege or contempt has been established, the leader of the House is mandated to move a motion that the matter of complaint be referred to the Committee of Privileges. Where, however, the member complained of is present when the complaint is made or attends pursuant to an order of the House, he should be given a chance to defend himself and as a matter of courtesy given notice before a complaint is made against him.⁷³

In instances where committees are mandated to inquire into a particular matter, the Committees' report must be submitted to the House before further action can be taken and where the Committee reports that no breach of privilege has been committed, no further proceedings is required. Where, however, a breach of privilege has been committed, the House by means of resolution, considers the kind or degree of punishment to be inflicted. Thereafter, the person named by the committee involved in the contempt attends the House to be heard before punishment is inflicted in line with rules of natural justice. In all cases of alleged contempt raised by a member of a Legislative House arising in respect of a statement published in a newspaper, book or other publication; the member is required to produce a

- *1. Order V. Rule 2 and 3 of the Rules of the House of Representative, National Assembly Press Abuja 2003.
- *2. See Chapter IV Rules 15 and 16 of the Standing Rules of the Senate 2001 Published by Rules and Business Committee of the National assembly.
- *3. See Azinge, *supra* at note 64.

copy of the newspaper or book containing the statement before the House. The name of the publisher or printer is also supplied to the House.⁷⁴

Punishment for contempt of a Legislative House oscillates between imposition of fine, term of imprisonment or to both fine and imprisonment under the Act. Where members of Legislative Houses are guilty of disorderly conduct in the House they may be reprimanded by the Speaker or in severe instances, suspended from the House sittings.⁷⁵ The National and State Houses of Assembly under sections 89 and 129 of the Constitution may impose fines for contempt arising from violations of House rules by witnesses or persons summoned before the House. Prosecution may only be instituted under the Legislative Power and Privileges Act, by the Attorney-General of the Federation upon information in writing given to him by the President of the Senate or the Speaker of the House of Representatives.⁷⁶ The Act should be read complimentary to the provisions of sections 88 - 89 and sections 128-129 of the 1999 Constitution when dealing with contempt of the legislative Houses in Nigeria.

The intervention of the Courts in Contempt Process

In the United Kingdom, the courts are precluded from interfering in the affairs of Parliament. Parliament in the United Kingdom possesses privilege to regulate its own internal proceedings. The supremacy of the English Parliament operates to bring its acts outside the scrutiny of the Courts. The Courts cannot carry out judicial review of Parliamentary acts.

In *Bradlaugh v. Gossett*,⁷⁷ Charles Bradlaugh, an atheist who had been elected as a member for Northampton, brought an action in the High Court against the Sergeant-at-Arms for an injunction to restrain him from excluding him by force from the

74. Order v. Rule 4.

75. Section 22 of the Legislative Houses Power and Privileges Act Cap 208 LFN 1990.

76. Section 32, *ibid.*

77. (1884) 12 QBD, 271.

House of Commons and a declaration that the order of the House preventing him from taking the oath was void. The court gave judgment for the Sergeant-at-Arms on the ground that the privilege of the Commons to regulate its own internal proceedings precluded the courts from inquiring into the questions.

In America, the 1857 statute⁷⁸ dealing with contempt of Congress has shifted the focus of contempt proceedings from Congress and its committees to the courts. Section 1 of the Act lays down a complex procedure for dealing with contempt. The section provides:

“If a committee determines that an act of contempt has been committed before it or one of its sub-committees, that fact is first reported to the President of the Senate or Speaker of the House, following action by the affected chamber the contempt is then certified by one of the above officers to the United States Attorney for the district in which the contempt was committed. The United States Attorney, in turn, is required to prepare a bill of indictment. The individual cited for contempt is then brought before a grand jury for possible indictment and tried by a Federal Court. If convicted, he faces a maximum punishment of one year in prison and a thousand dollars fine.”

In Nigeria, the powers of Legislative Houses to punish for contempt are amenable to judicial review by the courts. Section 6(6) (b)⁷⁹ gives the Judiciary power to review decisions or acts of the others. This power which acts as a check on the legislature is based on the principle of checks and balances, which is ingrained

78. 2 U.S.C. § 192.

79. 1999 Constitution.

the doctrine of separation of powers. Specifically, section 4(8)⁸⁰ states in clear terms that the exercise of legislative powers by the National Assembly or by a House of Assembly is subject to the court's jurisdiction. The courts in Nigeria in pursuance of this power have exercised this jurisdiction in a number of cases over the acts of the Legislature where the legislature in carrying out its legislative functions has acted in violation of the Constitution or laid down procedure.

Nigerian Courts have jurisdiction to entertain any matter of complaint to determine its propriety and whether the principles of fair hearing and natural justice were observed. A contemnor of a Legislative House in Nigeria is protected constitutionally by the procedural and substantive requirement of fair hearing in all trials whether before a court or an administrative body or tribunal exercising a quasi-judicial power. In all contempt trials where procedural and substantive requirements of fair hearing such as adequate notice given to the contemnor citing him for contempt or the right to counsel have not been followed, the Courts may review such decisions providing such redress or restraints to the contemnor of the Legislative House as it deems fit in the circumstances of each peculiar case. With respect to the investigative powers of the Legislature, the Courts can only intervene to restrain such investigations in instances where the investigations are outside the confines or scope of the competence of the Legislature.

The power of Legislative Houses to act independently of the Judiciary is not derogated from the provisions of section 4(8) of the Constitution. Section 4(8) sets the parameters for the constitutionality of legislative acts and does not act as a limitation on the right of the Legislature to regulate its internal proceedings. This position is reinforced by the provisions of sections 60 and 101 of the Constitution⁸¹ which empower Legislative Houses in Nigeria to regulate their own internal

80. *Ibid.*

81. 1999 Constitution of the Federal Republic of Nigeria.

proceedings including the procedure for summoning and recess of the House.

Conclusion

Privileges are an integral part of Nigeria's Legislative practice. Breaches of legislative privileges in Nigeria are treated as contempt punishable under the Legislative Houses (powers and privileges) Act and also under the 1999 Constitution. In the exercise of its powers and legislative functions, the House or its Committee may cite persons for contempt who either fail to respond to its summons or display unruly conduct before the House or its Committees.

Members of the executive arm of government who more often than not, are required to appear before the House or its Committees in investigations before the House should, in the interest of democracy obey the lawful summons of the House. It makes a mockery of our system and democratic values as a Nation when members of the Executive wilfully disobey summons to appear before the House or its Committees.

It is apparent that Legislative Houses need to protect their image and dignity and in so doing may need to exercise their committal powers to commit for contempt as and when necessary. The Legislature should exercise its Penal Jurisdiction sparingly. The power to punish for contempt should only be exercised when there is an overwhelming need to do so in the interest of the House. When the complaints against individuals are, on the face of it, seen as trivial and of no consequence, the legislative House should be quick to dismiss such complaints. When persons are summoned before a Legislative house, the House should, in the main, strive to ask questions that are relevant and germane to the investigations. Attempts to delve into extraneous facts, particularly personal questions and unrelated issues which have no connection with the investigation should be avoided. In committing for contempt, the rules of fair-play and natural justice should be observed.

The courts must exercise restraint when reviewing the acts of the Legislature particularly those done pursuant to its committal powers and should only act to set aside decisions in the interest of justice where procedural and substantive fair hearing principles have not been observed. It is important to note that once the House or its committee is acting within the scope and parameters of its mandate encapsulated in the Constitution, the courts ought not to interfere.

Finally, members of Legislative Houses should bear in mind that they are called to serve the people, that as public officers they should be amenable to criticisms from the press and the public in the discharge of their functions.

THE RIGHT OF RECALL UNDER THE 1999 CONSTITUTION

by

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Introduction

The right of recall of elected representatives provided by sections 59 and 110 of the Constitution of the Federal Republic of Nigeria 1999 (the 1999 Constitution) is an innovation. Previous Constitutions devised for the governance of Nigeria did not provide for recall. By these provisions, members of the Nigerian legislature may have their mandate terminated prior to the normal expiration of their constitutionally established terms of office. This is distinguishable from either resignation or death, or an action of the legislature in which a member is expelled.

These novel provisions of the Constitution have however, not been effectively utilised in the country. Although there have been several attempts at recalling some members of the National Assembly, there is no known case that has succeeded. The following pertinent questions arise as to the reason or reasons for failure. What is wrong with the procedure set out for recall? What have been the reasons for the attempted exercise of the right? How suitable are these constitutional provisions for our polity. These and other issues will form the crux of our discussion in this chapter. The chapter will examine the concept of recall, the statutory provisions for recall and the laid down procedures for the exercise of the right. It will consider two attempts at recall in Nigeria for purposes of analysing the reasons for failure. The experience of other jurisdictions will be discussed for comparison. Suitable recommendations and options will be proffered

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Recall?

*Law Dictionary*¹ defines recall as "removal of a public official from office by popular vote." The dictionary further defines recall election as "an election in which voters have the authority to remove a public official from office."²

Ace Encyclopaedia in turn defines recall as "the name of a mechanism by which voters can end an elected official's period of office before the next scheduled election for office."³

Furthermore, Hiram Johnson a reformist (then, Governor of California), once referred to the recall process as a "precautionary device by which a recalcitrant official can be removed." According to him, no illegality has to be committed by politicians in order for them to be recalled. If an elected official commits a crime while in office, the state legislature can hold impeachment proceedings. For a recall, only the will of the people is necessary to remove an official.⁴ This assertion is based on the American system whereby governors can also be recalled. In Nigeria, however, only members of the legislature can be removed by the same system.

In the context of the Nigerian Constitution the recall process is described as "the right voters have or the procedure used to remove an elected public official from office before his term expires based on a petition signed by a required number of voters from his constituency."⁵

A cursory view of the above definitions suggests that they apply to any public official and if applied to Nigeria may be beneficial. This is because, the provisions of the Nigerian

Black's Law Dictionary Eight Edition 2004 p. 1295.

ibid at p.557.

See Recall - ACE Electoral Knowledge Network at <http://aceproject.org/ace-en/focus/direct-democracy/recall>. Visited on the 19/01/07.

See Wikipedia, the free encyclopedia at http://en.wikipedia.org/wiki/2003_California_recall p.10 visited on the 16th January 2007.

Nchi, S.I , *Powers and Functions of Nigeria's National and State Legislative Assemblies*, Green World, Jos 2001 p. 221.

Constitution relate specifically to members of the legislature and not to other elected officials, such as the President and Governors who can only be removed by impeachment.

For purposes of this discourse, recall can be defined as a process by which voters can terminate the tenure of a member of any legislative house from their constituency on the basis of loss of confidence.

Recall is distinguishable from impeachment. Impeachment is defined as a procedure by which office held by it letters patent is vacated. It has its origin in English legal history and it was designed as a national inquest into the conduct of public men.⁶ It also serves as a check on the executive. Unlike recall which involves only legislators, impeachment drags a wider net. The President, Vice-President, Governor and Deputy-Governor are impeachable. Legislators can also be impeached for contempt.⁷

Several reasons may be adduced for a recall; they include allegations of misconduct, poor representation or loss of confidence resulting in a prevalent estrangement from the particular constituency. For instance in California, backers of the recall effort against Gray Davis cited his lack of leadership among other grounds. The circulated petition read:

“gross mismanagement of California Finances by overspending taxpayers’ money, threatening public safety by cutting funds to local governments, failing to account for the exorbitant cost of the energy, and failing in general to deal with the state’s major problems until they get to the crisis stage.”⁸

5. See Halsbury: *Laws of England*.

6. See sections 68, 143, 188 of the Constitution of the Federal Republic of Nigeria 1999.

8. See California Recall Election, 2003 p3, at http://en.wikipedia.org/wiki/2003_California_Recall visited on the 16/01/07 1pm.

The provisions of the Nigerian Constitution are however, vague on what the grounds of a petition may be. The term 'loss of confidence' may perhaps mean several things, ranging from grandstanding, claiming credit for constituency projects that were never executed, failure to consult the constituency, working against the creation of a state, gross under representation, non-performance and poor representation as instances of recall have shown.⁹

Proponents of the recall provision see it as a device to ensure regular and close oversight of elected public officials and to make them continuously, rather than periodically, more responsible and responsive to the will and desires of the electorate. With the recall system, it is argued, there is no need for the electorate to tolerate an incompetent, corrupt, and unresponsive legislator until that official's term is over.¹⁰

Statutory Provisions and Procedure for Recall

As earlier noted, "recall" is an innovation of the 1999 Constitution. Section 69 of the Constitution provides that a member of the Senate or House of Representatives may be recalled if on such a member:

- (a) there is presented to the Chairman of the Independent National Electoral Commission a petition in the behalf signed by more than one-half of the persons registered to vote in that member's constituency alleging their loss of confidence in that member; and
- (b) the petition is thereafter in a referendum conducted by the Independent National Electoral

9. See *This Day* Newspaper of 14th April 2006 at <http://www.thisdayonline.com> and *Daily Independent* Newspaper at <http://www.independentngonline.com> visited on the 16th January 2007.

10. Jack Maskell, 'Recall of Legislators and the Removal of Members of Congress from Office' *Report for Congress*, Congressional Research Service, the Library of Congress. March 20th 2003. On file with author.

Commission within ninety days of the date of receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member's constituency.¹¹

The above provisions of the Constitution give the electorate the power to recall a member of a legislative house following due process. This power can be compared with the power of removing the executive by impeachment given to the legislature; it is a laudable innovation that is designed to serve as a check on the legislature. This was aptly stated by Nchi thus:

By this novel device a legislator who has failed to give his constituents effective representation can be removed. This power can serve as an effective check on our law makers who may wish to just warm their seats and only enjoy the perks of office, or who may wish to play truant. While it may not check the legislature as a whole, it will check the individual members to ensure that they give proper representation to their constituencies.¹²

Recall Procedure

A recall initiative is launched when a petition is made to the Chief Electoral Officer, the Chairman of the Independent National Electoral Commission (INEC) stating the reasons for recall. The petitioners are then required to gather a specified number of signatures in support of the recall measure. The required number is one-half of the total number of voters registered to vote in that constituency. If and when, the recall petition receives enough valid signatures, the signatures are

¹¹. See section 110 of the Constitution of the Federal Republic of Nigeria 1999 for provisions relating to State House of Assembly members.

¹². "Powers and Functions of Nigeria's National, and State Legislative Assemblies" *op.cit* at 223.

verified, the legislator involved is contacted to verify and comment on the signatures of the petitioners after which INEC, would in turn commence its action by verifying the authenticity of the signatures of the registered voters in the district, constituency or council ward as the case may be.

Where the Chairman of INEC determines that the recall meets the requirements of either section 69 or 110 of the 1999 Constitution, the member ceases to hold office and the seat of the member becomes vacant. Thereafter an election is held to fill the position.¹³

The Nigerian Experience

A number of recall attempts have been initiated since the beginning of this civilian dispensation in 1999. The popular ones have all originated from the National Assembly. It is possible that similar moves may have been made in the State House of Assembly. This chapter will focus however more on some of the moves made in the Senate and House of Representatives.

The Attempt to Recall Senator Ibrahim Mantu

Moves to recall Senator Ibrahim Mantu, the Deputy President of the Senate began on the 14th of December 2005, when thousands of constituents from his Plateau Central Senatorial District were led by Chief Joseph Mangtup Din to the INEC headquarters to submit a petition, signed or thumb printed by 208,483 voters out of the registered 388,833 voters in the constituency. The petitioners alleged loss of confidence in Senator Mantu's capacity to represent them.¹⁴

In the covering letter forwarding the petition, the constituents stated thus:

13. See A Recall Petition against Senator Arthur Nzeribe at <http://www.inecnigeria.org/news> visited on the 19/01 /07.

14. See E.Aziken and H. Yakoob, "INEC gets Recall Petition against Mantu," in *Vanguard Newspaper* of 15/12/06.

"The people of Plateau Central District collectively and unanimously took this decision (recall) because they have studied, scrutinized and analyzed the kind of, mode and style of Senator Ibrahim Mantu's representation and have come to the irreversible conclusion that the senator has performed far below expectation of the people."¹⁵

At a press briefing following the submission of the petition, the leader catalogued the allegations against Senator Mantu in a statement titled "The Mantu we know" accusing the Deputy Senate President, among other things, of "grandstanding, claiming credit for constituency projects that were never construed, [sic] failure to consult the constituency and poor representation."¹⁶

The genesis of Mantu's recall could however be traced to the seeming feud between him and the then Governor of Plateau State, Chief Joshua Dariye. This much was confirmed by Senator Mantu's sharp riposte to the recall move. He discountenanced the allegations against him saying:

"This has been an ongoing matter since the state of emergency was declared. These people are like a negligible minority because most of them were people who were benefiting from the Governor who was suspended and because they are no longer getting their N40, 000 a month."¹⁷

This assertion was however rebuffed by the petitioners who averred that their grouse was that the Senator is more of a disappointment to them than an asset. They complained of lack of effective representation in the Senate even though 'their Senator'

Ibid.

Ibid.

Ibid.

occupies the post of Deputy Senate President. They further accused him of stirring trouble in his home State by using federal security agents to intimidate the people and government of Plateau State.¹⁸

Interestingly, the process could not run its full course as Senator Mantu went to Court for an injunction restraining INEC from commencing the verification of signatures as a necessary step towards a referendum.

The petitioners' leader filed a counter suit at the Federal High Court in Abuja seeking the recall of Mantu; the suit was however struck out. The court held that it had no jurisdiction to grant an order of *mandamus* compelling INEC to conduct a referendum for the recall of Mantu. The Court further held that for an order of *mandamus* to be made, fifty percent of the electorate in the constituency ought to endorse the recall.¹⁹ What could have been a classic example of a successful recall process was therefore scuttled by court injunction.

The Attempt to Recall Senator Arthur Nzeribe

On the 30th of May 2006, a petition for Senator Arthur Nzeribe's recall was submitted to INEC by representatives of Orlu Constituency in Imo State. The promoters of this recall process led by Dr Samfo Nwankwo hinged their action, among other things, on non-performance of the Senator and his support for the creation of Orasi State (which excluded vital parts of Orlu) as against Orlu State (which had constituents from the district and neighbouring parts of Anambra State).

Prior to the submission, a One Million march to drum up support for the recall was held on the 18th of April in Orlu. According to the leader, the march was to sensitize the people of the zone on the need to recall Senator Nzeribe quickly from the

18. See Emmanuel Onuoha, *Re: Impeach Mantu for What? At* <http://nigeriaworld.com/articles/2006/apr> visited on 16/01/07 1pm.

19. See *The Tide* Newspaper of 29th July 2006, at <http://www.thetidenews.com> visited on the 23rd January, 2007. 4pm.

Senate so that he would not continue to work against the interests of those who elected him.²⁰ This bid did not succeed as it was stalled at INEC. The signatures were not verified and so the process could not be completed.

A significant feature of these attempts to recall legislators is that they were perceived to be politically motivated. Oraetoka²¹ alluded to this when he observed that the:

“trends of insidious but politically motivated recall threat arising from the states controlled by the ruling party are supposedly masterminded by the governors of these states.”

He noted further that initially, it was Deputy Senate President, Senator Ibrahim Mantu from Plateau State and Senator Nzeribe that were under threat of recall, but that Senator Dalhatu Tafida, representing Kaduna North had also joined the list probably for his stand on the issue of constitutional amendments.²² It was further suggested that his membership of the Senator Mantu led Joint Conference for the Review of the 1999 Constitution could be part of the reason for his travail.

The *Leadership* Newspaper of 6th April, 2006 also carried a report that confirmed these perceptions. It stated that “already, the consequences of this voting pattern has [sic] started to manifest as the Benue State Government has begun the process of recalling Senator Fred Orti for casting his vote to retain Mantu on his seat.”²³

— See *This Day* Newspaper of 14th April, 2006 p.5.

— See Emeka Oraetoka, “Senate - Recall as Tool in the Hands of Anti-PDP/3rd Term Governors” at http://www.amanaonline.com/Articles/art_1842.htm visited on 16/01/2007. 1pm.

— This view was reported in the *Leadership* Weekend newspaper of 1st April 2006. *Ibid.*

Lessons from the Nigerian Experience

A number of reasons can be put forward as being responsible for the relative failure of the electorate to exercise the right of recall as provided for in the 1999 Constitution. One cannot rule out the effect of injunctions granted by courts stalling the recall process as evidenced in the above analysis on the Mantu example. What is more, INEC in most cases appears reluctant to complete the process of recall. Other factors identified can be subsumed within each of the following possibilities: - the Novelty of the Provisions; Political and Selfish Considerations; Cumbersome Procedures and Money Politics.

First, the provisions of the Constitution relating to recall are relatively novel as they are only found in the 1999 Constitution. Nigeria therefore does not enjoy the requisite historical experience of their implementation. This may be responsible for the relative failure of the provisions. The implementation of the procedure relating to recall has similarly been bedevilled by lack of precedent for INEC to be guided by. It has thus been groping in the dark in much the same way as the constituents wishing to exercise their right of recall.

Second, the Nigerian experience has shown that attempts to exercise the right of recall have been largely fraught with political colouration and selfish motives. These means that previous attempts to recall erring members of the National and State Legislative Houses have not been altruistic. More often than not, motivations for the exercise of the right to recall Legislators emerge as a result of political disagreement among the major players in a political party jostling for dominance or major players in the theatre of conflict seeking to impose their will on the populace.

These factors have been responsible for the derailment of the process over time. Until political actors are guided by the letter and spirit of the Constitution, the successful exercise of this right will remain illusory. From the instances analysed above, there is usually an external force working behind the scenes to spur the recall processes. In the case of Mantu for example, it was largely

speculated that his troubles arose as a result of his estrangement from the Governor of Plateau State and the quest to control the state politically, thus causing the latter to sponsor his recall.²⁴

Third, the procedure for recall is itself cumbersome. Gathering signatures of one-half of those registered to vote in the member's constituency, verification of the signatures by both INEC and the member being recalled, holding a referendum within ninety days approved by a simple majority of votes of members of the constituency is quite an unwieldy a process. The size of a constituency in the country alone is an impediment; getting genuine signatures amounting to the required percentage may also be difficult. From case studies, signatures gathered were done at centres where registers were opened, which presupposes that a small proportion of the members of the constituency were actually involved. The fact that these processes were stalled either at the stage of collecting signatures or verifying them, demonstrates the cumbersome procedure. Alternatively, the cumbersome procedure could be a design to deter reckless resort to the right of recall. The fact that the majority of the populace who are supposed to steer the process are ignorant of these Constitutional provisions also exacerbates the problem.

Fourth, the pervading influence of money in Nigerian politics is one of the inhibiting factors to the successful exercise of the right to recall. As already noted above, the cumbersome procedure provided in the Constitution is rather capital intensive. A lot of resources are required to gather signatures and to go through the whole procedure. Thus, without massive support

— *Vanguard* Newspaper of 15th December 2005 reported that in answer to questions from Senate correspondents relating to the recall move, Mantu replied sharply that the recall move was the joke of the century asserting that he was in total control of the affairs of the PDP in Plateau State. Mantu dismissed the leaders of the move to recall him as disgruntled elements who he claimed were fighting him on account of his role in the imposition of emergency rule which, he claimed, hindered them from enjoying the patronages they were getting from the Joshua Dariye administration.

from the government that often controls the resources, the exercise of this right may not be feasible for the ordinary people. By the same token, a rich politician with the necessary financial power may scuttle the process inspite of overwhelming public opinion in support of the recall process.

The Exercise of the Right of Recall in other Jurisdictions

In view of the relative novelty of the recall provisions in the Nigerian Constitution, it is relevant to consider the practice in some other jurisdictions where the right of recall is used. This could be useful for comparison and could hold lessons that Nigeria can draw from.

The United States of America

The United States Constitution does not provide for the recall of officials such as Senators, Representatives to Congress, the President or Vice-President of the United States of America. Although, it was considered during the drafting of the Federal Constitution in 1787, recall provisions were however jettisoned and thus not included in the final version of the Constitution sent to the States for ratification.²⁵

Some States Constitutions however have provisions for the recall of their elected officials. It began in Los-Angeles in 1903, Michigan and Oregon, in 1908; Minnesota is the most recent - 1996.

In the State of California for example, the recall process came available to Californians in 1911 by the Progressive Era reforms that spread across the United States in the late 19th and 20th centuries. The ability to recall elected officials came with the initiative and referendum processes. No illegality has to be committed by politicians; the will of the Californian people suffices for the commencement of the recall processes.

See Jack Maskell , *op. cit.* at CRS-6.

Also, any elected official may be the target of a recall campaign. This includes Governors.²⁶ Proponents of the recall must gather a number of signatures equal to twelve percent of the number of votes cast in the previous elections from registered voters within a certain period.²⁷

Recently, Gray Davis, the then Governor of California was successfully recalled.²⁸ Prior to this, California just like Nigeria had series of recall attempts, out of 117 attempts, only 7 made it to the ballot stage. These attempts were for the recall of State Legislators. Davis was the first Governor to be recalled. It is significant to state that eighteen states²⁹ in the United States allow the recall of state officials, the District of Columbia also provides for recalls. Virginia is not listed as a recall State because its process, while requiring citizen petitions, allows a recall trial rather than an election. With the Davis recall, only two governors have ever been successfully recalled. The first was Lynn J. Frazier from North Dakota who was recalled in 1921.

British Columbia, Canada

British Columbia is the only jurisdiction in Canada with recall legislation. The procedure is relatively similar to what obtains in Nigeria. Under their Electoral Act, a registered voter for an Electoral District may apply for the issuance of a petition for the recall of the member of the Legislative Assembly for that electoral district to the electoral officer accompanied by a \$50.00 processing fee.

²⁶. Note the disparity with the Nigerian system where governors are only removed by impeachment proceedings.

²⁷. See California recall election, 2003 at http://en.wikipedia.org/wiki/2003_California_recall visited on 16-01-2007 at 1pm.

²⁸. He was replaced by Arnold Schwarzenegger.

²⁹. Alaska, Arizona, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington and Wisconsin.

If satisfied that the requirements are met, the Chief Electoral Officer must notify the proponent, the Member in relation to whom the petition is to be issued and the Speaker that the application has been approved in principle. A recall petition must be signed and submitted within 60 days from the date on which it is issued by the Chief Electoral Officer.³⁰

A recall petition requires 40% of the total number of individuals who are entitled to sign the recall petition. The Chief Electoral Officer then determines within 42 days, whether the petition meets the requirements. When all these are ascertained, the Member ceases to hold office and the seat of the Member becomes vacant.³¹

As at 1998, seven petitions had been given approval in principle for the recall of Members of the Legislative Assembly. Lastly however, there has been some discontent with the provision. It has been opined that the provision violates the Constitution Act 1982 and that the recall provisions are also *ultra vires* the Legislature of British Columbia because they offend against the preamble to the Constitution Act, 1968.

In *The British Columbia Civil Liberties Association and Avigail Eisenberg v. The Attorney General of British Columbia*³² a suit filed by the BCCLA contending the legality of the recall legislation, the plaintiffs argued among other things that the recall provisions violate section 41 of the Constitution Act, 1982 because they alter the Office of the Lieutenant Governor. That the recall provisions: (a) dilute or undermine the Lieutenant Governor's power to dissolve the legislative assembly by creating a power of dismissal of all or part of the assembly in a minority of the electorate; (b) interfere with the ability of the Lieutenant to select and dismiss Ministers at pleasure; and (c) undermine the

30. See BCCLA Position Paper at <http://www.bccla.org/positions/political> visited 19/01/07.

31. *Ibid.*

32. See BCCLA Position Paper at <http://www.bccla.org/positions/political> visited 19/01/07.

legal and constitutional principle that the government's authority is derived from the crown.³³ This suit did not succeed, as such, the provisions nevertheless still subsists.

Conclusions

The right of recall in Nigeria is a creation of the 1999 Constitution. Despite its novelty, the utility of the provision from the point of view of holding elected representatives of the people (Legislators) accountable by their constituents cannot be over emphasised. Proponents of recall maintain that it provides a way for citizens to retain control over elected officials who are not representing the best interests of their constituents, or who are unresponsive or incompetent.

Opponents on the other hand, argue that it can lead to an excess of democracy, that the threat of a recall election lessens the independence of elected officials, that it undermines the principle of electing good officials and giving them a chance to govern until the next election and that it can lead to abuses by well financed special interest groups.

The exercise of the right has so far eluded constituents in Nigeria due to a number of reasons already discussed in the foregoing part of the chapter. To ensure the efficacy of this right there is need for the following:

- a) sensitization of the populace on the need to view the mechanism as a device to assure regular and close oversight of elected public officials and to make elected officials more continuously, rather than periodically, responsible and responsive. That it should be a tool in their hands to rid the constituency of an incompetent, corrupt, and unresponsive representative;
- b) review of the procedure to make it less cumbersome but transparent. There is need for meaningful

33. *Ibid.*

disclosure laws so that voters will know who is bankrolling a recall process. This is to eliminate ulterior motives by special interest groups that might use the process to stymie a legislator just to settle scores;

- c) give the Legislator involved a last chance to meet the demands of the people. Under such a system, once a petition gathers enough signatures, the lawmaker involved would be given a specified time limit to meet the demands;
- d) infuse the process with more populist tendencies, such as mandatory disclosure to the people of the persons who is behind the collection of signatures and how much money is being used for the entire process.

CAMPAIGN FINANCE AND DEMOCRACY IN

by

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Introduction

Current trends in campaign finance are widely acknowledged as a threat to democratic elections and national development! Campaign finance is used to make elections more than a "more money, more votes" affair, giving prominence to money in politics and reducing the electorate.

In Nigeria, the use of money and funds in political campaigns of candidates and election expenses, have been subjected to regulation since 1977.² However, the acknowledged negative impact of money in politics has led to the regulation of campaign finance in our new Electoral Act 2006 and the 1999 Constitution.

This Chapter seeks to examine the impact of money in politics, the regulation of campaign finance and the role of the Independent National Electoral Commission (INEC).

¹ "The objective of campaign finance laws is to regulate the disclosure of large donations, those given secretly, which have been identified by a body politic as parties to provide the voters with information concerning that they need to make informed choices." Donsanto, "Campaign Finance Laws in the United States," <http://democracy.ru/english/library/international>.
² The Electoral Decree 1977. See Amadu Kuol, *Democracy in Nigeria: 1959 and 1979 and the Aftermath*, 1983 (Lagos: Spectrum, 1983) (No. 4) 2002 in sections 76 - 84 contained provisions for the regulation of parties, election and the supervision and control of the INEC.

³ Sections 225 & 226 1999 Constitution. See Amadu Kuol, *Democracy in Nigeria* (No. 2) 2006.

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(Macmillan) 257. The Electoral Act
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ctions 86 - 95 of the Electoral Act

the light of comparative campaign finance laws and best practices obtainable in other jurisdictions. This is with the aim of revealing whether it is the regulatory system that is inadequate or the enforcement/implementation of the laws, that accounts for the negative impact of money in politics through campaign finance.

The Concept of Money in Politics

A free and fair election or a successful election does not depend solely on what happens on the Election Day. The totality of the preliminary issues such as the nature of the electoral system, voter entitlement, voter registration, party organization, civic education, funding of the election and election expenses, are important factors to be considered.⁴ Most political analysts agree that financing an effective political campaign requires a large sum of money in modern times, depending on the variables of the geographical constituency of the political parties, the number of the political parties, and the issues at stake in the campaign among others.⁵ Chief Gani Fawehinmi, the Presidential Candidate of the National Conscience Party (NCP) in the 2003 Presidential Elections, commenting on the election from the perspective of his party's performance in the election and the future election of 2007 had this to say:

"So, reviving in March for an election in April was difficult. We were far behind financially, logistically and otherwise ... Secondly, we all knew all that happened. There was no election. The government of the day used money and unconstitutional means to make people vote against their conscience. Again, they took

4. Guy S Goodwin Gill, *Free and Fair Elections: International Law and Practice*, 1994 (Inter-Parliamentary Union) X - XIV at X, and p.62.
5. Brown Onuoha, "Transition, Democracy and the Debate on the Funding of Political Parties in Nigeria," in *Transition Politics in Nigeria: 1970-1999*, edited by Brown Onuoha and M. M. Fadokunte, 2002, (Malthouse Press Limited) chapter 8. Edward Erhagbe *supra* at 65.

advantage of the fact that we are poor. We did not have polling agents to man the poll for us. To man Lagos alone, we would need close to N20 Million, giving N100 to each agent. I financed my own campaign, each NCP candidate financed his or her own campaign.

There was no money coming from anywhere until after the polls when INEC decided to give three million naira to each party. Now when you compare this with Mr. President who got contribution of N5.6 billion with about N2 billion coming from the corporate world, some came from construction industry and even from abroad.

These are contrary to the Electoral Act, under which you are not supposed to spend more than N20 on each voter."⁶

Money is seen as an essential ingredient for democratic governance. Thus, the concept of money in politics concerns the issues of funding political parties and campaigns through donations from individuals, corporate bodies, foreign interests, public funding, the control of election expenses and the monitoring, supervision and enforcement of electoral laws, rules and regulations within the political systems, to ensure the proper use of money in politics.

A classical formulation on election financing by Dr. Alexander Heard, states as follows:

"(1) that sufficient money be available to sustain the great debate that is politics, which means to assure the main contestants an opportunity to present themselves and their ideas to the electorate;

6. *The News Magazine*, December 8, 2003 p. 20.

- (2) that the needed sums be obtained in ways that do not inordinately weigh the process of government in favour of special interests; and
- (3) that the system commands the confidence of the citizens whose governmental officials are chosen through it.”⁷

From the above formulation, it will be seen that money will always remain an issue in politics for any system of constitutional democracy.

In Nigeria, prior to 1979, political parties funded themselves through the common sources associated with traditional forms of party organization⁸ which remained in use during the second and fourth Republic. Donations, contributions, fund raising activities, and loans were heavily relied upon by the Peoples Democratic Party (PDP) during the 1999 and 2003 elections. It is this practice that gave rise to wealthy individuals or groups of individuals funding the elections to key offices also known as “god-fatherism” in politics. In Anambra State, one individual, Chris Uba, single-handedly sponsored the political campaign of the majority of the legislative representatives to the House of Assembly of the State and the gubernatorial campaign of the Governor, Dr. Chris Ngige.⁹ As part of the sponsorship agreement, Dr. Chris Ngige had signed a letter of resignation. Before he was sworn-in as the Governor, his political mentor, Chris Uba, presented the “letter of resignation” to the House of Assembly when the Governor allegedly reneged on the agreement and terms of his sponsorship with his political mentor. We are yet to hear the last of the damaging effect of this practice

7. *The Cost of Democracy*, 1960, 430-431; cited by E.C.J. Azinge, “Legal Control of Political Party Financing in Nigeria,” *The Nigerian Juridical Review*, Vol. 4, 1989-90, 101-108 at 101.

8. These include registration fees, dues or subscriptions, donations, contributions, fund raising activities and loans. See Brown Onuoha *supra* at 140-144.

9. Whose election was nullified by the Courts at least 3 years into a four-year tenure.

on Anambra State, the South-East zone and the nation in general.¹⁰

The rationale for public funding of political parties and election expenses, apart from individual or corporate funding, is usually linked to the desirability of establishing, as far as possible, a 'level playing field.'¹¹ It may also incidentally help to keep political parties independent of financial pressure in situations where the role of parties is complex and often controversial,¹² as is the case in Nigeria.

Public funding of political parties began formally in Nigeria in 1977, but has since become part of the constitutional provisions and the Electoral Acts of 2001 and 2002. Thus, by sections 94-96 of the Electoral Act 2001 and sections 80-83 of the Electoral Act 2002, provision is made for annual grants to political parties for their operations. While 30% of the grant is to be shared equally among all the registered political parties, the remaining 70% of the grant shall be shared in proportion to the number of seats won by each party in the National Assembly. The majority party, the PDP, therefore received more of the grant than the two other parties i.e. the All Nigeria Peoples Party

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10. See *Tell Magazine*, July 28, 2003, "The Making of a Coup Plotter", *Tell Magazine*, November 8, 2003, 17, "Ngige A Goner", Chris Uba addressing faithful in Awka, reported in *The News Magazine*, December 8, 2003, p.14 had this to say "Why we came is to tell you that we have brought the party to the state to wipe out tears. Whoever has suffered for the party must eat. This is the party we belong to and we are disciplined to the party you should not be afraid. Everything put into the party, all of you must benefit from it."
 11. Other reasons identified by Jean Claude Masclat include the fact that with a combination of freedom of association and the sovereignty of the people, public funding makes the political right effective. *Doit Electoral*, 1989, 251 quoted from Guy S. Goodwin *supra* at 60.
 12. Guy S. Goodwin Gill *Ibid*. The political parties, potentially are to manage the affairs of the state; they are to assist stability by establishing a firm and reliable party structure; their role is for public good, therefore the state should contribute to that public and general good This type of state funding will contribute towards the autonomy of the political parties, particularly under severe economic crisis when "money bags" would otherwise hijack and privatize the parties through their financial contributions, and end up controlling what goes on in the parties and elected government. See Brown Onuoha, *supra* 138.

(ANPP) and Alliance for Democracy (AD) under the 1999-2003 term of the fourth Republic.

However, indirect and undisclosed public funding by the party in government such as the PDP, denies financial resources to its opponents, while using all the resources at its disposal to put the opposition at a disadvantage. The worst victim of such practice is the Alliance for Democracy (AD) party which lost all but one (Lagos) of the States it won in the South-West in the 1999 elections only during the 2003 elections. The states it controlled in the South-west were lost to the PDP, the party at the centre controlling the national funds.

External aid has been ruled out as an impermissible source of funding in Nigeria. However, where a donation or aid is received by any political party from abroad, it shall be paid over or transferred to the Independent National Electoral Commission within twenty-one days of its receipt.¹²

Uncontrolled flow of money into political campaigns would encourage the corruptive influence of large campaign donations. Of course, where this influx of money is not even (which is always the case in multiparty elections), it would be like inviting people to participate in a race with some riding bicycles, some motorcycles and some cars. An election may indeed be likened to a sporting activity in which many qualified and willing candidates compete for the first position. Like sports, an election is meant to be contested in a friendly and honourable manner according to well-established principles and rules.

Components of Campaign Financing and Disclosure Laws

The corruptive influence of large campaign donations on political campaigns can be limited by campaign financing laws and these laws consist of one or more of the following components:

¹² Section 225(3)(b) and (4) of the 1999 Constitution. The Chairman of INEC, Prof. Maurice Iwu, has publicly acknowledged the difficulties encountered by INEC in enforcing these provisions.

- Contributions received and expenditure made by candidates seeking political office should be mandatorily disclosed to the public by political committees that participate in the campaign process;
- Quantitative limits on contributions to political candidates and to campaign committees should exist;
- Funding from "infamous" such as government contractors or foreign nationals should be limited or outrightly prohibited as they present acute corruption risks to society;
- Public financing of political campaigns, either as a supplement to private funding or as a substitute for it should be encouraged;
- Quantitative limits on political campaign expenditure should be set;
- Corrupt election practices that rely greatly on monetary factors such as vote buying and using public offices or benefits as inducement or reward for political activity should be prohibited;
- There also has to be a comprehensive enforcement mechanism comprising of administrative, civil and criminal penalties tailored to fit varying dimensions and magnitude of offences to the laws and enforced through agencies whose political neutrality has the confidence of the body polity since a regulatory scheme is only as effective as the consequences for violating it;
- The avoidance of after-the-fact litigation through creating a mechanism whereby those whose conduct potentially falls within the sphere of regulation may obtain formal interpretative advice from a neutral administrative source

concerning the reach of the law to the anticipate conduct.¹³

In Nigeria, the laws presently in effect do embrace many of the components listed above. Although it is not absolutely necessary that all the components listed be present in the campaign finance system of a country,¹⁴ it is necessary for the law to guarantee through the fundamental components that candidates and political parties in election campaigns compete on equal terms.

The laws, which regulate campaign finance in Nigeria, include the 1999 Federal Constitution, the Electoral Act 2006 as well as the Companies and Allied Matters Act. These will be examined under the next heading.

Existing Laws and Restrictions on Campaign Financing in Nigeria

Constitutional Provisions

Individuals have traditionally enjoyed the right of sponsoring themselves for election in Nigeria. Although individuals are free to sponsor candidates, associations not formally recognized and registered as political parties cannot constitutionally do so.¹⁵ Section 221 of the 1999 Constitution of the Federal Republic of Nigeria provides that only a political party shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election. This section therefore in effect prohibits political

13. See Craig C. Donsanto: *Campaign Financing Laws in the United States*, *op. cit.* p.2: also see Marcini Walecki "Political Money and Political Campaign Considerations for Nigeria" *op. cit.* p.6.

14. One country may for example, be libertarian on the amount of money which may be raised and spent and therefore place no limit on the amount of money which political parties may spend during an election campaign, while another country may impose such spending limits as a means of checking the source of money and to ensure a level playing field.

15. D.I.O Ewelukwa: *Nigerian Electoral Law* Enugu, Shelters International Ltd. p.105.

activities including the campaign financing of any candidate by associations other than political parties. This would at least, by implication, include big government contractors, foreign contractors as well as wealthy private individuals, where the motive behind their "donation" to a political party or candidate in an election is questionable. As far back as 1986 for example, "The Fouggerolle Affair"¹⁶ brought to light, how big government contractors as well as foreign companies seeking government contracts in Nigeria could manipulate election results through large "donations" to favoured candidates, thereby posing the acute risk of high level corruption in the society. In that case, a five-man meeting comprising former President Shehu Shagari, former Senate Leader and then Chairman of the National Party of Nigeria (NPN) in Kwara State, Abubakar Olusola Saraki, Shagari's party chairman Augustus Akinloye as well as two French nationals, who were officials of Fouggerolle, a French-owned construction company, discussed the possibility of getting Fouggerolle to "donate" some money to the NPN, if the company were to be favoured with a major civil work contract at the Ajaokuta steel plant in Kwara State.

Section 224 of the Constitution provides that the programs, aims and objectives of a political party shall conform with the provisions of Chapter II of the same Constitution containing the fundamental objectives and directive principles of state policy including *inter-alia*, the abolishment of all corrupt practices.

Most of the political parties have branches, wings or affiliations in Nigerian communities abroad, especially the United Kingdom and the United States of America who have been known to remit or send funds to them from outside Nigeria. This is a constitutionally forbidden source of funding.¹⁷ Prohibition of outside or foreign funding is based on respect for

16. See full report in *Newswatch Magazine*, August 25, 1986, p.15ffs.

17. See full report in *Newswatch Magazine*, August 25, 1986, p.15ffs.

the principle of national sovereignty and non-interference in the internal affairs of states in their electoral processes.¹⁸

Apart from funding, there is the problem of expenses as “expenses incurred by a political party within the period from the date notice is given by the Independent National Electoral Commission (INEC) to conduct an election up to and including the polling day in respect of the particular election,”¹⁹ which must be submitted to the Commission by the political parties.

Obviously, it has been realized in most jurisdictions that the concept of money in politics, the questionable nature of some large contributions, the character of such donors, and the seemingly inappropriate access to the highest political office such as the Presidency and gubernatorial offices must be regulated, such regulations enforced and where necessary sanction or punish violators.

Politics in Nigeria, according to Claude Ake is an all consuming business. Not only does it consume the energies of all too many Nigerians because it is the gateway to wealth, it is also all-consuming because of the ways in which it affects the operations of the major institutions of the nation.²⁰ Thus in order not to allow money politics consume constitutional democracy, a legal framework must be established to check and eliminate the negative effects of money in politics.

While the 1960 Independence and 1963 Republican Constitutions recognized the right of every person to assemble freely and associate with other persons and in particular to form or belong to other associations for the protection of his interests,²¹ there were no specific constitutional provisions for the

18. See operative paragraph 6 of United Nations General Assembly (UNGA) resolution 46/130 adopted 17 December, 1991 and repeated in UNGA resolution 47/130 adopted December 17, 1992 and 48/124 adopted December 20, 1993.

19. Section 84(1) Electoral Act 2002; section 94 Electoral Act 2006.

20. Presidential address to the Nigerian Political Science Association, *West Africa Magazine*, May 25, 1981, quoted in Richard A. Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, 1991. (Spectrum Books Ltd.) 177.

21. Section 25 1960 Constitution and 26 1963 Constitution respectively.

management and control of political parties, talk less of party finances. Unlike the 1960 and 1963 Constitutions, the 1979 Constitution injected the right to peaceful assembly and association, the right to "form or belong to any political party"²² and provisions on the management and control of political parties for the first time.²³ These provisions have been retained in the 1999 Constitution.²⁴

The constitutional scheme that imposes a requirement of registration of political parties with INEC, further specified a scheme for the management, supervision and control of the finances of political parties by INEC under sections 225 and 226 of the Constitution. These include submission of the statement of its assets and liabilities to INEC by the political parties, at such times and in such manner as the INEC may require.

More importantly, in relation to the sources of money of the political parties, section 225(2) of the 1999 Constitution provides thus:

"Every political party shall submit to the Independent National Electoral Commission a detailed annual statement and analysis of its sources of funds and other assets together with a similar statement of its expenditure in such form as the Commission may require."

Thus there is a constitutional duty imposed on the political parties to disclose their sources of funds and election expenses. In the *INEC v. Musa Case*,²⁵ the Supreme Court in interpreting the constitutional scheme held, per Ayoola JSC:

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22. (*Italics Mine*). These were not part of the provisions of the 1960 and 1963 Constitutions.
 23. Part II Supplemental D-Political Parties sections 201-209, are innovative provisions of the 1979 Constitution.
 24. Chapter VI Part III Supplemental D-Political Parties, sections 221-229 of the 1999 Constitution.
 25. (2002) 17 NWLR p.413.

“The National Assembly has powers: by virtue of section 228(d) of the Constitution, to confer by law powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of sections 221-229 which deal with political parties; and by virtue of item 56 of the exclusive legislative list, to legislate for the regulation of political parties. INEC has direct power granted by the Constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning any guideline or regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional.”²⁶

However, the Electoral Act, 2001 and the Commission’s guidelines for the registration of new political parties, established in the exercise of the power conferred on the Commission by the 1999 Constitution and the Electoral Act, 2001, were in the *INEC v. Musa Case* held to be unconstitutional, null and void, as they violated the provisions of sections 40 and 222 of the 1999 Constitution.²⁷

Electoral Laws

The National Assembly has since enacted the Electoral Act No. 4 of 2002 and Electoral Act No 2, 2006. The Acts confer on the Commission the power to monitor and keep records of the activities of all the registered political parties.²⁸ The Commission

26. *Supra* at 454.

27. Per Ayoola JSC at pp. 454-460.

28. The enforcement of the control and monitoring provisions by INEC constitute the scheme for bringing into the public domain the sources of funding of political parties. This has however not met with the cooperation of the political parties; as such sources are rarely accurately disclosed by them to the Commission. It is

is also vested with power to place limitations on the amount of money or assets which an individual or corporate body can contribute to a political party. There is an urgent need to have INEC's guidelines or regulations on limitations of donations by individuals or corporate bodies to a political party, along the lines of the scheme of the Political Elections and Referendum Act 2000 of United Kingdom or the Federal Election Campaign Act and the Bipartisan Campaign Reform Act 2002 of the United States of America. Moreover, section 38(2) Of the Companies and Allied Matters Act 1990, prohibits a company from making donations to a political party or association, just as section 15 of the Trade Union Act²⁹ prohibits a trade union from using its funds for the furtherance of any political objective.

As earlier observed, funding from outside Nigeria is constitutionally prohibited in section 225 of the 1999 Constitution, while section 87 of the Electoral Act 2006 makes it an offence for any political party to hold, possess or retain funds from outside Nigeria, as such funds or assets shall be forfeited to the Commission and on conviction, the political party shall be liable to a fine of not more than N500, 000.00 (five hundred thousand naira). These provisions do not go far enough, as the punishment should be extended to the officials of the political party, by disqualifying them from thereafter holding offices in any political party upon conviction. Also, the fine of N500, 000.00 can be said to be small considering the prevailing foreign exchange rate between the naira and other currencies such as the dollar, pound sterling or euro.

Compelling political parties to give details of their election expenses, which is to be statutorily limited in section 94(2) of the Electoral Act 2006 is aimed at reducing the amount of money

the duty of the Commission to exercise its constitutional powers to compel accurate and full disclosure by the political parties, under sections 225-226 of the 1999 Constitution and under the Electoral Act 2002, (section 78(2), 83(2), 84(5) & (7)); and the Electoral Act 2006 (sections 86, 87, 88-95).

29. No 31 of 1973 now Cap 437 Laws of the Federation of Nigeria 1990.

spent by political parties during elections.³⁰ It is essential that the Commission establish an effective machinery for the enforcement of the provision on the election expenses of political parties. So long after the 1999 and 2003 Elections, such election expenses of political parties are yet to be published either by the political parties or the Commission, as required by sections 94(5) and (7) of the Electoral Act 2006.

Presently, defaults by political parties merely attract fines to be imposed on the political parties. It will serve as a better deterrent if the candidates or officers of the political parties are also exposed to personal liability in the event of breaches, violations and defaults under the electoral laws. However, the provisions prohibiting corrupt practices, by imposing responsibility on the candidate, person or group of persons who "shall directly or indirectly offer or aid in offering inducement in any form whatsoever to a person at a political campaign for the purpose of corruptly influencing that person or any other person to support or refrain from supporting a political party or candidate," in section 87 of the Electoral Act 2002 is omitted in section 97 of the Electoral Act 2006.³¹ The criminal liability of imprisonment, apart from fines extended to the candidate stop short of the officers of the Political Parties such as the Chairman, Secretary and Treasurer, in section 87(5)(b) of the Electoral Act 2002. In reality, however, it is these officers who conceive and execute the schemes for corrupt practices that will ensure the success of their political parties at the polls. Thus, it is hoped that "political party or person" in section 97(7) of the Electoral Act 2006 will be given a wide and liberal interpretation to cover the officers of Political Parties.

No doubt the constitutional and statutory framework of the 1999 Constitution and the Electoral Acts 2002 and 2006 is an improvement on the pre-existing legal framework, for the

30. Compare section 94(2) of the Electoral Act 2006 with section 84(2) of the Electoral Act 2002.

1. Section 87 Electoral Act, 2002, and section 97 Electoral Act 2006 compared.

regulation of campaign finance. However, in the British and American jurisdictions, electoral law reforms follow closely after elections and observed weaknesses in the system as revealed in the abuses and corrupt practices not addressed by the existing electoral laws, in order to propose and enact electoral laws that are aimed at achieving effective control of campaign financing in subsequent elections.

Comparative Analysis of Campaign Finance Laws

A comparative analysis of campaign finance laws noted that Nigeria's electoral laws were derived from the provisions of the British Representation of the Peoples Act of 1948/1949 and regulations made under it.³² Thus, Nigeria's colonial, common law and commonwealth heritage makes British legal development a ready source of law reform for our legal system. In view of the fact that in addition, since 1979, Nigeria's Presidential Constitution has borrowed from the American Constitutional law, form and system of Government, it will therefore be relevant to examine the electoral laws and systems in these two countries, particularly the role of money in politics, that is, their electoral finance laws and regulations.

The British Labour Government in 1997 extended the terms of reference of the Committee on standards in Public Life (Neil Committee) to include political party funding. The Neil Committee fifth report, "The Funding of Political Parties," published in 1998, and the Government White paper including a draft Bill, became the Political Parties Elections and Referendum Act 2000 (PPER Act).³³

Before the PPER Act, the law played little part in regulating parties. Part II of the PPER Act is designed to put in place arrangements for bringing political parties within the scheme of

32. Amadu Kurfi, *Election Contest: Candidate's Companion*, 1989 (Spectrum) Chapter 1 at p.1.

33. Hood Phillips and Jackson, *Constitutional and Administrative Law*, 2002 (Sweet & Maxwell) 8th edition, 217-226, at 217. See Explanatory Note on PPERA at <http://www.hmso.gov.uk/acts/en/oen41.a.htm> Visited on February 8, 2004.

control set out in parts III to V for regulating their income and expenditure. These arrangements take the form of a scheme of registration, building upon the existing registration arrangements introduced under the Registration of Political Act 1998.³⁴ The 1999 Constitution and especially, the Electoral Act 2002 in section 68, employ registration of political parties as part of the scheme for controlling their funding and campaign expenses.

The funding of political parties under the PPER Act builds on the existing requirements that political parties should be registered, as it must adopt a scheme approved by the Electoral Commission, which sets out arrangements for regulating its financial affairs, such as keeping of accounts showing income and expenditure, an annual statement of their accounts in accordance with regulations laid down by the Commission.³⁵

Donations may only be accepted if the donors are "permissible donors" and the identity of the donor is known, and parties have to keep details of all donations over £5,000 (UK pounds) or more.³⁶ Section 95(1) of the Electoral Act 2006 of Nigeria has a similar provision couched as follows:

"No political party shall accept or keep in its possession any anonymous monetary or other contributions, gifts, properties, etc. from any source whatsoever."

The PPER Act introduced for the first time, controls on campaign expenditure by political parties, by imposing financial limits on the total campaign expenditure permitted by registered political parties "for election purposes and by defining what is

4. The PPER Act repeals much of the Registration of Political Parties Act 1998. (See Schedule 22 of the PPER Act). See Hood Phillips and Faction *supra*; and Explanatory Note *supra*, Part II.

5. Sections 26, 41-43, and 47 of the PPER Act.

6. Sections 52, 56, 62 and 36 of the PPER Act. Donations are defined widely to include gifts of money or other property; subscriptions, loans, property or service at less than commercial value; sponsorships (sections 50 – 53 PPER Act).

meant by campaign expenditure.³⁷ The maximum amount of money a party may spend in a parliamentary general election, is based on the number of constituencies contested, with an allowance of £30,000 (UK pounds) made for each constituency up to a maximum in relation to England, of £810,000 (UK pounds) and in relation to Scotland of £120,000 (UK pounds).³⁸ The limits of election expenses are set out in section 93 of the Electoral Act 2006, thus:

- 93.(1) Election expenses shall not exceed the sum stipulated in subsections:
- (1) (7) of this Section.
 - (2) The maximum of election expenses to be incurred by a candidate, at a Presidential election shall be (N500, 000,000).
 - (3) The maximum of election expenses to be incurred by a candidate a Governorship election shall be (100,000,000).
 - (4) The maximum amount of election expenses to be incurred in respect of senatorial seat by a candidate at an election to the National Assembly shall be (N20,000,000); while the seat for House of Representatives shall be (N10,000,000) respectively.

37. Section 73(4) of the PPER Act defines for election purposes as "promoting or procuring electoral success for the party at any relevant election". While section 72(2) defines "campaign expenditure" by reference to the list of qualifying expenses set out in Part I of Schedule 8. Any expenditure on a matter set out in this list during the relevant period of election (as defined in Schedule) will need to be accounted for as campaign expenditure. Campaign expenditure include direct expenditure, such as party political broadcasts, advertisements, unsolicited materials addressed to electors, the party manifesto, market research, rallies, transport, etc. (Schedule 8) and expenditure on benefits in kind, property, services facilities (section 73).

38. Section 79 and Schedule 9 set out the financial limits on campaign finance. The limits for Parliamentary general elections are set out in paragraph 3 of Schedule 9.

- (5) In the case of State Assembly election, the maximum amount of election expenses to be incurred shall be (N5, 000,000).
- (6) IN the case of Chairmanship election, the maximum amount of election expenses to be incurred shall be (N5, 000,000).
- (7) In the case of Councillorship election, the maximum amount of election expenses to be incurred shall be (N500, 000).
- (8) In determining the total expenditure incurred in relation to the candidature of any person at any election no account shall be taken of:
 - (a) any deposit made by the candidate on his or her nomination in compliance with the law;
 - (b) any expenditure incurred before the notification of the date fixed for the election with respect to ;services rendered or material supplied before such notification.
 - (c) political party expenses in respect of the candidates standing for a particular election.
- (9) No individual or other entity shall donate more than (N1, 000,000) to any candidate.
- (10) A candidate who knowingly acts in contravention of this Section commits an offence and is liable on conviction;
 - (a) in case of Presidential election to a maximum fine of N1,000,000.00 or imprisonment of 13 months or both;
 - (b) in the case of a Governorship election to a fine of N800,000.00 or imprisonment for 9 months or both;

- (c) in case of senatorial seat in the National Assembly election to a fine of N600000.00 or imprisonment for 6 months or both;

In the United States where the trend in campaign financing with escalating amounts being needed to successfully run for office³⁹ is making it increasingly difficult for people of average means to be involved as candidates, while also heightening public cynicism about the political process, campaign finance reform has brought about the passing into law of the Bipartisan Campaign Reform Act of 2002.

The modern era of comprehensive finance regulation began in 1971 with the adoption of the first Federal Election Campaign Act. The objective of campaign financing laws is to minimize the corruptive influence of large donations, given secretly, particularly those originally from sources that have been identified by a body polity as particularly prone to abusive action and to provide the voters with information concerning the flow of funds to candidates that they need to make informed choices in the voting booth.⁴⁰

The scheme of the Federation Electoral Campaign Act of 1971 and the Bipartisan Campaign Reform Act consist of the following:

- (a) Mandatory public disclosure of contributions and expenditure made by candidates seeking political office and by political committees that participate in the campaign process;

39. Between 1976 and 1999, spending by candidates for the US Congress rose from \$115 Million to \$765.3 Million. In 1998, the average cost of winning a Senate seat was \$4.5 Million, compared to \$609,00 in 1976. In Nigeria though, there are no official statistical data on the cost of election to Political Officers, however, are no official statistical data on the cost of election to Political Officers, however, the statutory limits set out in section 93 of the Electoral Act 2006 is far below the realistic cost of election expenses actually incurred in winning elections into each of the offices enumerated.

40. Craig C. Dansanto, "Campaign Finance Laws in the United States, *supra*."

- (b) quantitative limitations on contributions to political candidates and to campaign committees;
- (c) outright prohibition on the making or receipt of contribution from funding sources considered to present acute corruptive risks to the society;
- (d) public financing of political campaigns, either as a supplement to private funding or as a substitute to it (Presidential Election Fund Act and the Presidential Matching Payment Act);
- (e) quantitative limitations on amounts that political campaigns may expend;
- (f) prohibitions against corrupt election practices that rely significantly on monetary factors, principally, vote-buying and using public offices or benefits as inducements or rewards for political activity;
- (g) comprehensive enforcement mechanism containing administrative, civil and criminal penalties tailored to fit the varying dimensions and magnitude of offences to the above laws and enforced through agencies whose political neutrality has the confidence of the body polity.⁴¹

It can be observed from the above comparative analysis that Nigeria's Electoral Statutes have benefited from the electoral campaign financing and expenses laws of the United Kingdom as well as the Campaign Finance Laws of the United States. What seems to be lacking is the machinery and the will to enforce the laws on the part of INEC. A matter unrelated to the problem of funding of INEC itself. Clearly, the funding of INEC needs to be charged to the consolidated Revenue Fund to free it from the whims and caprices of the ruling party in government.

41. *Ibid.* See also, "Campaign Finance Reform" by Communications Workers of America at <http://www.cwa-legis-pol-org/legfacts/campaign%20finance.2%20factsheet.Html>.

Recommendations and Conclusion

The 1999 Constitution and the Electoral Act 2002 contain definitive provisions on the role of money in Nigerian politics. The independence of INEC as well as its ability to implement the provisions remain doubtful given the circumstances discussed. In addition, some of the areas in the legal framework require some firming up and more effective enforcement machinery, especially, in the light of the pervasively corrupt Nigerian politico-economic environment.

The following are recommendations for reducing the disruptive and negative impact of money on the political process:

1. The funding of INEC must be constitutionally charged to the Consolidated Revenue Fund of the Federation in order to ensure its independence and impartiality in the supervision and management of the finances of the political parties.
2. It is imperative that the machinery for the supervision and monitoring of funding of political parties and political expenses be established and made operative by INEC or by an independent body that may be specifically established for that purpose.
3. A comprehensive enforcement mechanism containing administrative, civil and criminal penalties, together with an agency whose political neutrality has the confidence of the body polity, must be established in order to curb the excesses of politicians, political god-fathers, corporate bodies and the political parties. Obviously, the office of the Attorney General as a Minister of the Executive cannot be seen as politically neutral to inspire confidence in the electorate for the enforcement of campaign finance offences.
4. Sanctions must go beyond fines and imprisonment for short term offenders. They must extend to disqualification of such

offenders from future participation in politics in order to sanitize the political stream and be rid of such pollutants and corruptive elements.

5. The public funding of political parties must not be subject to the whims and caprices of the government of the day, but rather must be administered in an objective and determinable manner that will not be prejudicial to other political parties.
6. An effective system of ensuring public disclosure of information on the funding and political expenses of political parties must be established, since public disclosure will bring to light and create public awareness of the sources of financing of political parties and any; corruptive influences arising from such sources.
7. An electoral law reform body which will be independent of INEC, though working with it in a supervisory and consultative capacity in order to propose law reforms arising from lapses in the electioneering exercises and the electoral system, should be established.

The Constitutional order established by the 1999 Constitution has witnessed two electioneering exercises (1999 and 2003), yet campaign finance laws are yet to play any significant role in lessening the impact of money on Nigerian elections. The Chairman of INEC, Professor Maurice Iwu, who will oversee the conduct of the next elections in 2007, has on several occasions warned the political parties and political office seekers about the readiness of INEC to enforce the campaign finance provisions of the Electoral Act 2006. However, in the absence of any evidence of compliance with the disclosure, audit reports and publication provisions of the Electoral Act 2006, there cannot be any clear evidence of readiness on the part of

INEC to enforce the said campaign finance provisions of the Electoral Act 2006. They remain fundamental however and *must* be enforced by INEC! Political Parties and Politicians *must* be made to comply with the provisions, in order to deal with the new trends of political excesses in the use of money in politics, such as “political god-fatherism,” “corporate sponsorship in exchange for contracts,” “illicit donations,” “foreign sourced donations,” and the like!

DISQUALIFICATION OF CANDIDATES FOR ELECTIVE OFFICE: CONSTITUTIONAL IMPERATIVES

by

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Introduction

The Constitution normally spells out the qualifications of candidates for elective offices. The policy implication is to ensure that minimum standards of education and morality are met for one to be adjudged competent to contest for an elective office. In the same token, candidates may be disqualified for the same reason. There are however certain conditions during the tenure of an elected officer that may disqualify such a person from either continuing with the position or from seeking a fresh political mandate.

This Chapter seeks to address the constitutional imperatives surrounding the status of an elective officer who either cross-carpet to another political party whilst still in office or desires to contest for an elective office whilst in office but is adjudged to have committed an offence which automatically precludes him from so doing.

Qualifications for Elective Office

Sections 65 and 66 of the 1999 Constitution of the Federal Republic of Nigeria deal with the issue of qualifications for and disqualifications from the membership of the National Assembly. As regards qualification for membership, the candidate must be a citizen of Nigeria¹ and must (for Senate) have attained the age of thirty five years.²

1. Section 65 (1) (a).

2. For House of Representatives, the age is 30 years.

Furthermore, the candidate must be educated up to at least school certificate level or its equivalent and must be sponsored by a political party of which he is a member.³

For the President and Governors of States, the Constitution provides⁴ that a person seeking to be elected President and Governor respectively must be a citizen of Nigeria by birth, has attained the age of 40 years and 35 years respectively, be a member of political party and sponsored by that party; and he has been educated up to at least school certificate level or its equivalent.

Disqualifications

The Constitution is replete with criteria for disqualification of candidates for election to elective offices. The most fundamental of these is the voluntary acquisition of the citizenship of another country and a declaration of allegiance to such a country.⁵ Furthermore, any candidate who under any law in force in any part of Nigeria is adjudged to be a lunatic or otherwise declared to be of unsound mind is automatically disqualified from contesting election as a candidate. So also is a candidate who is under a sentence of death imposed on him by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for an offence involving dishonesty or fraud or any other offence imposed on him by such a court or tribunal.

Contravention of the Code of Conduct is also a serious ground for disqualification of candidates. In this regard, a candidate who within a period of less than ten years convicted and sentenced for an offence involving dishonesty is also disqualified from contesting election.

Others that are disqualified are: undischarged bankrupts, persons employed in the public service of the federation or state;

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3. Section 65 (2) (a) & (b). The same constitutional requirements apply to candidates for membership of the House of Assembly by virtue of section 106 except that the age limit for the House of Assembly is 30 years.
 4. Sections 131 and 177.
 5. Section 66(1) (a).

member of a secret society; indicted for embezzlement or fraud by a judicial commission of inquiry or an administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry law or any other law by the federal or state Government which indictment has been accepted by the Federal or State government; a candidate has presented a forged certificate to the Independent National Electoral Commission.

In addition to the foregoing, a candidate for the office of President⁶ or Governor⁷ who has been elected to such office at any two previous elections is automatically disqualified from contesting election to the same office.

Person Employed in the Civil Service or Public Service of the Federation or State

It is crucial to examine the real import of the constitutional provisions which stipulate that a person employed in the public service of the federation or of any state and has not resigned, withdrawn or retired from such employment thirty days before the date of election⁸ shall be disqualified from being a candidate for election. Interestingly, the Constitution restricts disqualification for election to State and National Assemblies to only those employed in the public service. However, with respect to presidential election, the constitutional provision reads "being a person employed in the civil or public service..."⁹ What this means ordinarily is that a person employed in the civil service of the state or federation need not resign, retire or withdraw his service if he is only seeking elective office as a member of State or National Assembly.¹⁰

Recently, there has been a spate of resignations by Ministers, Special Advisers, Commissioners and a host of public

6. Section 137.

7. Section 182.

8. Sections 66 (1) (f); 107 (1) (f).

9. Section 137 (1) (g).

10. See section 318 of the Constitution for the Interpretation of CIVIL SERVICE and PUBLIC SERVICE respectively.

officers interested in contesting elective office in the 2007 general election. The offices mentioned above are basically political appointments and not employment in the public service as envisaged by the Constitution. Furthermore, there is no constitutional provision that seem to exclude the President, Vice-President, and Governor from application of the provisions of sections 66, 107 and 137 of the Constitution. Thus, it is critical to address the constitutional implication of President, Vice President, Governor, and Deputy-Governor not resigning from public office while seeking a fresh mandate or re-election to the same office. Unfortunately, this matter has not come before the courts for judicial interpretation. However, it does appear that there is nothing in the Constitution that seem to confer on these officers special prerogative to remain in office and contest for fresh mandate.

Indictment for Embezzlement or Fraud

Section 137(1) provides that a person shall not be qualified for election to the office of President if:

“He has been indicted for embezzlement or fraud by a judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry law or any other law by the federal or state Government which indictment has been accepted by the federal or state Government, respectively.”

The import of the above is that to be disqualified from contesting election to the office of President by virtue of section 137(1) (i), the person must have been:

- (a) Indicted for embezzlement or fraud;

- (b) The indictment must be by a judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal;
- (c) The indictment must have been accepted by either the federal or state government as the case may be.

What Constitutes an Indictment under Section 137(1) (i)?

The word indictment is not defined by the Constitution. However the fact that a person must have been indicted for embezzlement or fraud suggests that he or she must have been charged for a felony which embodies the criminal ingredients of either embezzlement or fraud. This means that there must have been an accusation or charge by a competent body indicting the person sought to be disqualified.

The courts are yet to interpret or pronounce on the meaning of indictment as contained in section 137 (1) (i) of the Constitution. However, there are fundamental questions to be addressed in examining the true import of section 137 (1) (i). First, does indictment for “embezzlement or fraud” mean that the person appearing before the Administrative Panel of Inquiry is to be regarded as guilty of the indicted offences once such a person is alleged to have committed the offence even though there has been no formal charge nor any material evidence to prove that the person committed such an offence? Secondly, must the person be informed that he has been charged with such offences and be given the freedom to defend himself or herself?

Third, must such a person be actually found guilty of either the offence of embezzlement or fraud before he can be regarded as indicted under section 137(1) (i) following which the indictment can be forwarded to the competent organ for its acceptance?

The answers to the above inquiries may not be located in any judicial pronouncement on section 137 (1) (i). However, both the Court of Appeal and the Supreme Court laid the foundation for

accurate analysis of section 137 (1) (i) in the interpretation of section 182 (1) (i) of the Constitution which is in *pari materia* with section 137 (1) (i) but relates mainly to the disqualifications of Governors.

In *Umana v. Attah*,¹¹ the Court of Appeal was faced with the interpretation of section 182 (1) (i). Here the learned counsel for the appellant argued that the meaning of the word "indictment" in the context of section 182 (1) (i) means more than bringing up a charge against a person even where that person was neither aware of the charge nor was brought before a court or Tribunal. The court *per* Olagunju J.C.A held that the submission of the learned counsel ran counter to the definition of the word indictment by *Black's Law Dictionary*. Quoting from *Black's Law Dictionary* 6th edition, he defined indictment as:

"A formal written accusation originated with a prosecutor and issued by a grand jury against a party charged with a crime. An indictment is merely a charge, which must be proved at the trial beyond reasonable doubt before the defendant may be convicted (*U.S v. Zouluck D.C .V. Y. 274 SUZZ 385, 390*). An indictment is only an accusation; it is the physical means by which a defendant is brought to trial. Its sole purpose is to identify defendants alleged offence, and it is not evidence that the offence charged was committed and may not be considered as evidence by the jury during the deliberations; *U.S v. Glaziou, C.A.N.Y. 402F 2d 2d 8, 15 pages 98 - 99*."

In view of this definition, the court came to the conclusion that the learned counsel for the appellant was in grave error in his submission that the validity of an indictment cannot be tested by the fact that the accused person was not confronted with the

11. (2004) 7 NWLR 63.

charge against him. Honourable Justice Akaah in his judgment dismissed the argument of counsel for the Appellant that once information is filed before the tribunal alleging wrong doing by an incumbent Governor, that this was sufficient to disqualify him. In his opinion, "the interpretation to be given" to section 182 (1) (i) is: "unambiguous and straight forward. The indictment that would bar the Governor from election is if he has been found guilty by a judicial Commission of Inquiry or an Administrative Panel of Inquiry. In such a case, the judicial Commission of or Administrative Panel of Inquiry after completing its assignment would then forward its recommendations to the Government and if the Government accepts the recommendations made to it, that is the time that it can be said that the person has been indicted. The form of indictment is the issuance of a white paper. Before this is done, the person indicted would have been invited to appear before the committee and given the specific allegations made against him so that he can react to them either by admitting the allegation or denying same. The principle of *audi alterem partem* is observed whether it is a judicial Commission or Administrative panel that is set up for no one should be condemned without a hearing".

The Supreme Court in *Okotte-Eboh v. James MANAGER*¹² equally addressed the meaning of the word 'indictment' as contained in section 66(1) (h) of the 1999 Constitution. Late Honourable Justice Pats - Acholonu J.S.C provided the definition of the word by relying on the *Black's Law Dictionary*. At the end, he concluded that the word Indictment:

"embraces an allegation or a committal of something in the nature of a felony, which act having been committed has occasioned, the drafting of charge with a view to prosecuting the person."

From the foregoing, it is clear that an indictment involves three elements:

- (a) There must be an allegation or committal of something in the nature of a felony.
- (b) The act must be proved to have been committed.
- (c) The allegation must have occasioned the drafting of a charge with a view to prosecuting the person.

Analysis of Competent Authority to Make an Indictment under the Constitution

By virtue of section 137(1) (i), only three bodies can indict a President or Vice-President. They are namely:

- (a) A Judicial Commission of Inquiry, or
- (b) An Administrative Panel of Inquiry
- (c) Tribunal set up under the Tribunal of Inquiry Law or any other Law set by the Federal or State Government..."

A Judicial Commission of Inquiry is usually headed by a Judge and has a mandate to embark on fact finding with a view to documenting its findings in the form of a report to the constituting authority. As regards a Tribunal of Inquiry, the decision in *Fawehinmi & Ors .v. Babangida & Ors*¹³ is quite instructive. Here it is obvious that the President cannot constitute a Tribunal of Inquiry under the Inquiry Act. The court held in the *Fawehinmi case* that the President has no power to set up a Tribunal of Inquiry since the 1999 Constitution has made no provisions for Tribunals of Inquiry as did the 1963 Constitution which deliberately empowered the National Assembly to legislate on Tribunals of Inquiry. The court observed that there was no such equivalent provision in the 1999 Constitution. Without such constitutional provisions under the 1999 Constitution, the Supreme Court held that:

13. NSCQLR 592.

“No valid law can be made, or can exist standing on its own and of a general nature, to apply throughout the federation of Nigeria on the strength of which the President may set up a Tribunal or Commission of Inquiry. This is because no law specifically authorized or backed by the constitution can be lawfully passed for the federation of Nigeria by the Federal legislature.”¹⁴

It follows that a Tribunal of Inquiry cannot easily be invoked for purposes of indictment since the Act no longer derives its legal validity from the 1999 Constitution. The use of Administrative Panel of Inquiry for indictment of President or Vice-President is a contentious issue. The reason is that it is not clear whether it is only the President that can set up an Administrative Panel of Inquiry under section 137 (1) (i) of the Constitution. It is therefore not clear what happens when it is the President that is being investigated for purposes of indictment. Also, the opinion expressed in *Fawehinmi v. Babangida* leaves the impression that what the Constitution envisaged is not an Administrative Panel of Inquiry of a general nature. This presupposes that the National Assembly has no constitutional power to make laws for the establishment of Administrative Panels of Inquiry of a general nature for the federation. Secondly and more importantly, it is my considered view that the setting up of Administrative Panel of Inquiry to indict the President or Vice-President under section 137 (1) (i) amounts to the use of an Administrative Panel to usurp the exclusive criminal jurisdiction of the Federal High Court in criminal matters relating to the “administration of or the management and control of the Federal Government or any of its agencies” contrary to sections 251 (1) (p) and 252 (2) of the 1999 Constitution. This position was driven home by Honourable Justice Karibi-whyte JSC in *Dangote*

4. Uwaifo S. O. J.S.C at p. 617.

v. *CSC Plateau State*¹⁵ where there is an allegation of criminal wrongs against a person, the jurisdiction to determine the allegations is vested in the court and the exercise of such jurisdiction cannot be usurped by any Administrative Tribunal." What this means is that an Administrative Panel of Inquiry is merely a fact finding panel and to that extent lacks the capacity to indict anyone on allegations of wrong doings or criminal conducts envisaged by section 137(1) (i) of the Constitution.¹⁶

Relationship between Section 137(1) (i) and Section 308 of the 1999 Constitution

By virtue of section 308 of the Constitution, it is clear that the President, Vice-President, Governor and Deputy-Governor enjoy immunity from criminal proceedings during their period in office. In that case, they cannot realistically be indicted for embezzlement or fraud by an Administrative Panel. Two fundamental questions can be raised in this regard. First is: can any law enforcement agency conduct an investigation (including an Administrative Panel of Inquiry) on the President, Vice-President, Governor or Deputy-Governor without contravening the immunity granted them by section 308. Secondly, assuming such investigation can be conducted, would it not contravene section 308 of the Constitution?

Relating this to the investigations conducted by EFCC and the Administrative Panel of Inquiry in the PTFD Indictment of Vice-President Atiku, the fundamental question remains; does that constitute the institution of criminal proceedings contrary to Section 308? The point has been made that criminal investigations do not constitute criminal proceedings and are therefore, outside the scope of section 308. The views of Uwaifo J.S.C and Kalgo Jsc In *Fawehinmi v. Ig of Police*¹⁷ are quite

15. (2001) 9 NWLR 132.

16. Contra the decision of the Court of Appeal in *Daggash v. Bulama*, (2004) 14 NWLR 144 which in my considered opinion is flawed.

17. (2002) 10 NSC or pgs 853-854.

instructive. Hon Justice Uwaifo was of the view that there can be no support for the argument that Police investigations is part of criminal proceedings as provided in section 308. Kalgo JSC put it succinctly when he opened:

“There is no doubt that in all criminal allegations, investigation plays an important part and it will make or mar subsequent criminal proceeding, but that does not make it qualify as being part and parcel of criminal proceedings, so as to qualify as such proceedings under section 308(12) of the 1999 Constitution. It appears to me therefore, that the holders of the offices mentioned in section 308(3) of the 1999 Constitution can be investigated.”¹⁸

On the face of it, the view expressed above is flawless. However, it is critical to determine what (if any) is the boundary between “*Investigation*” and *Criminal Proceedings*. Is mere questioning of the suspect as done by the Administrative Panel of Inquiry a mere Investigation or the Institution of Criminal Proceedings? Hon Justices Uwaifo and Kalgo are not agreed on this. While Justice Uwaifo was of the view that “Criminal proceedings are commenced when an accused is arraigned before the court, or at least when an information or charge is filed against him in court, Justice Kalgo on his part was of the clear view that Criminal proceedings extends to questioning the suspect. According to the learned Judge:

“It appears to me clearly, therefore, that the holders of the offices mentioned in 308(3) of the 1999 Constitution can be investigated but only to the extent that they should not be questioned,

. *Supra* pp.874-875.

arrested or detained or asked to make any statement in respect of such investigation.”¹⁹

It follows from the above that the Investigation by the EFCC did not in any way infringe the immunity of the Vice-President from the Institution of Criminal proceedings under section 308(1). However, the conduct of the Administrative Panel in questioning the Vice-President means that the body traversed the boundary between investigation and the arena of Criminal proceedings thereby violating the immunity of the Vice-President under section 308(1) of the Constitution.

Can the Switch from One Political Party to Another Disqualify a Candidate or Cost Him His Office?

For members of the legislative Houses, sections 68(1)(g) and 109(1)(g) provide that members of the legislative Houses cannot switch parties except in cases of merger of their parties with another party or in the event of factionalization of the party under whose platform they won their seats. Unfortunately, our courts have yet to pronounce on what amounts to “a merger” of two or more parties or “a division” or “a factionalization” of any of the existing registered parties. INEC too is not consistent in its application of the constitutional provisions judging by its attitude to AD and APGA. However, we await a judicial pronouncement to clarify the meaning of the terms “merger,” “division” and “factionalization.”

As regards the President, Vice-President, section 131 of the Constitution is not as elastic as sections 68(1)(g) and 109(1)(g) respectively. Unlike the position of the Constitution in respect of members of the legislative Houses switching political affiliation, there is no provision in the Constitution that suggest that the President or Vice-President will lose office or be disqualified from contesting elective office by switching parties before the end of their tenure.

19. Pages 873-874.

Legality of Proposed Disqualification of Candidates by the EFCC

Recently, the Chairman of EFCC has stated that corrupt Nigerian politicians will not be allowed to contest election. The position of the Law is that the EFCC is not legally authorized to disqualify candidates. Indeed apart from the Constitution and the Electoral Act (which in the main reproduces the provisions of the Constitution) no other law authorizes the disqualification of candidates for elective offices.

The nation therefore has to brace up for spate of litigation by politicians contesting their disqualifications not necessarily on grounds stipulated in the Constitution but on what may be described as illegal disqualification of candidates.

CONSTITUTIONAL IMPLICATIONS OF THE EXECUTIVE TEAM TICKET

by

Chief Awa Kalu SAN
(*Black Skin, White Masks, Grove Press*)

...But society, unlike biochemical processes cannot escape human influences. Man is what brings society into being. The prognosis is in the hands of those who are willing to get rid of the worm-eaten roots of the structure...¹

Introduction

The worsening condition in the observance of the rule of law and due process in the invocation of several aspects of our Constitution for meeting the exigencies of politics and government in recent months has been less than exemplary. An innocent bystander cannot but be worried by a proclamation of a state of emergency in two different states in the past three years. Besides, the impeachment gale that has so far, blown away the elected Governors of at least four states² may, to say the least, have far reaching implications for our Constitutional democracy.

It may also be recalled that for several months, discussion in our political space was dominated by a keenly debated proposal to amend the Constitution for the purpose of elongating the tenure of elected executive office holders.³ Of course, no one can easily forget that kites were flown in certain quarters raising

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1. Frantz Fanon: *Black Skin, White Masks, Grove Press, 1967, p. 11* quoted in Tunji Olagunju, Sam Oyovbaire, eds. *For Their Tomorrow, We Gave our Today*, selected speeches of IBB Vol. 11, Safari Books (Export) Limited p. XV.,
 2. Bayelsa, Oyo, Ekiti and Anambra. Several other impeachments are expected before the next general elections.
 3. The brouhaha occasioned by the 'tenure elongation' debate was so hot that it nearly overshadowed the work of the National Political Reform Conference (2006) chaired by Honourable Justice Niki Tobi, JSC.

speculations about the possibility of the consideration of an Interim National Government (ING).⁴ Notwithstanding the dimension of these other issues, our invitation is to dilate on the topic, CONSTITUTIONAL IMPLICATIONS OF THE EXECUTIVE TEAM TICKET.

Quite a few preliminary or prefatory remarks are warranted by the topic. The first is to note that the Constitution of the Federal Republic of Nigeria 1999, (The Constitution) creates three branches of government – the Legislative, the Executive and Judiciary.⁵ The second point is very important. It is that, of the branches of government so established, it is only in relation to the executive branch that the Constitution provides for partnership which is what the topic under consideration refers to as an ‘*executive team.*’ It is therefore germane at this stage to note that the Constitution provides that “*there shall be for the Federation a President.*”⁶ Similarly, there is established under the Constitution the office of Vice-President.⁷ Having regard to the creation of the offices of President and Vice-President respectively, the Constitution also provides that:

“in any election...a candidate for an election to the office of President shall not be deemed to be validly nominated unless he nominates another candidate as his associate from the same political party for his running for the office of President,

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4. This country had experimented with an Interim National Government pursuant to the provisions of the Interim National Government Decree, 1993.
 5. While section 4(1) of the Constitution vests the legislative powers of the Federal Republic of Nigeria in the National Assembly, subsection (6) thereof vests the legislative powers of a State in the House of Assembly of the State; section 5(1)(a) of the Constitution vests the executive power of the Federation in the President and the executive powers of a State in the Governor of the State; Judicial powers of the Federation are by section 6(1) vested in the Courts to which the section relates being courts established for the Federation and the judicial powers of a State are provided for in section 6(2) of the Constitution.
 6. Section 130(1).
 7. Section 141.

who is to occupy the office of Vice-President and that candidate shall be deemed to have been duly elected to the office of Vice-President if the candidate for an election to the office of President who nominated as such associate is duly elected as President in accordance with the provisions aforesaid.”⁸

The Constitution makes similar provisions in relation to the office of Governor⁹ and Deputy Governor.¹⁰

The final point to note at this juncture is that there are several sections of the Constitution which relate to or impact directly on the executive team ticket. The first of such sections is of course section 5(1)(b) which provides that the executive powers of the Federation vested in the President “shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.”¹¹

With regard to the Governor of a State, the Constitution makes important caveats, namely: that the executive powers vested in a State shall be exercised so as not to

- (a) impede or prejudice the exercise of the executive powers of the Federation;¹²
- (b) endanger any assets or investment of the Government of the Federation in that State,¹³ or

8. Section 142. In section 142(2) the Constitution states that the provisions relating to qualification for election, tenure of office, disqualification, declaration of assets and liabilities and oaths of President shall apply in relation to the office of Vice-President as if references to President were references to Vice-President.

9. Section 176(1).

10. Section 186(1) is *impari materia* with section 142(1) and section. 187(2) replicates section 142(2).

11. Similar provisions are made for a Governor in section 5(2)(a) and 5 (2)(b) thereof.

12. Section 5(3)(a).

(c) endanger the continuance of a federal government in Nigeria.¹⁴

Apart from that section, the other sections which are noteworthy relate to the provisions for the office of President,¹⁵ the qualification for election as President,¹⁶ tenure of office of President,¹⁷ Death, etc. of president-elect before oath of office,¹⁸ disqualifications,¹⁹ disqualifications from other jobs for the President,²⁰ declaration of assets and liabilities, oaths of the President,²¹ establishment of office of Vice-President,²² and nomination and election of Vice-President.²³ Other provisions which touch upon the executive team ticket include those dealing with the removal of the President from office,²⁴ permanent incapacity of President or Vice-President,²⁵ acting President during temporary absence of President,²⁶ Ministers of the Federal

3. Section 5(3)(b).

4. Section. 5(3)(c) *Quaere*: Having regard to recent events indicating that the Governors of Bayelsa and Ekiti States were removed from office following reports forwarded to the State Houses of Assembly by the Economic and Financial Crimes Commission (EFCC) and the attendant public outcry against the want of due process in those situations, can it not be argued that the use of an Agency of the Federal Government to destabilize a State Government is likely to endanger the continuance of a federal system in Nigeria? The governments of Abia and Benue States are presently in litigation in the Supreme Court (against the Attorney-General of the Federation) to determine the scope of the powers of the EFCC; see SC. 73/2006, *AG. Abia State v. AG. Federation & 35 Others*; SC. 179/2006, *AG. Benue State v. AG. Federation & 35 Others*.

5. Section 130, *Ibid*; section 176 relates to the States.

6. Section 131; see also section 177 with regard to a State.

7. Section 135; see section 180 as regards the States.

8. Section 136; see section 181 for the States.

9. Section 137; and see section 182 for the States.

10. Section 138; see also section 183 for the States.

11. Section 140; also see section 185 for the States.

12. Section 141; also see section 186 for the States.

13. Section 142; see also section 187 for the States.

14. Section 143; see also section 188 with regard to the States.

15. Section 144(1); See for the States, section 189.

16. Section 145; Also see section 190 for the States.

Government,²⁷ Executive responsibilities of Ministers,²⁸ Presidential appointments,²⁹ Code of Conduct,³⁰ and Prerogative of Mercy.³¹ There are yet other provisions of the Constitution that have great impact on the executive team ticket. For example, section 305 which deals with the procedure for declaration of a state of emergency in the Federation or any part thereof has been invoked on two occasions,³² and has since resulted in very acrimonious debate, and indeed in litigation.³³ Perhaps, the most contentious provision is that which imbues executive office holders with immunity.³⁴ Other areas relate to the dissolution of the National Assembly and State Houses of Assembly by the President and Governors, respectively; the remuneration of the President and Governors and the right of attendance of the President and Governors in their respective legislative houses.³⁵ As would be expected, it is not possible to deal in this chapter with all the provisions of the Constitution which touch upon the executive team ticket nor can all the recent developments be recapitulated. Having regard to all the circumstances, it is our intention to deal specifically with the question of immunity, removal of executive office holders from office, death of both or one of the team and tangentially, the declaration of a state of emergency.

27. Section 147; for the States, see section 192.

28. Section 148; for the States, see section 193.

29. Section 151; see section 196 for the States.

30. Section 172; for the State, see section 209.

31. Section 175; for the States, see section 212.

32. On 18 May, 2004 by the State of Emergency (Plateau State) Proclamation, 2004, published as Statutory Instrument No. 4 of 2004, the President of the Federal Republic of Nigeria declared a state of emergency all through Plateau State, suspended the Governor and his Deputy from office and the State House of Assembly was also suspended for the duration of the emergency. Ekiti State recently suffered the same fate.

33. See Suit. No: SC. 113/2004, *Plateau State of Nigeria & Anor v. Attorney-General of the Federation & Anor*, (2006) All FWLR, (Pt. 305) 590; The Abia State Government is presently in the Supreme Court - Suit No: SC. 253/2006.

34. See section 308 of the Constitution.

35. See sections 64(105), 84(111), 67(108).

Immunity

The aspect of the topic which calls for undiluted attention is of course familiar, topical, yet a vexed one. As is also well known, the topic is contentious in the light of the fact that in the last couple of years, public discussion has been dominated by the immunity which the Constitution of the Federal Republic of Nigeria 1999 (hereafter called "*The Constitution*") confers on the President, Vice President, Governors and their Deputies³⁶ which insulates these elected officials from either civil or criminal prosecution or indeed from any unwarranted court process whether civil or criminal. It is legitimate to reproduce the provisions of section 308(1) of the Constitution which states that:

"Notwithstanding any thing to the contrary in this Constitution, but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office, (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) no process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued;..."

All that can be said at this stage is that the elected officials of the executive branch who are imbued with immunity as already explained enjoy such immunity for as long as they hold any of the offices covered by the section under consideration irrespective of the nature of any offence allegedly committed by any such office holder or the severity of the punishment which

³⁶. See section 308 of the Constitution.

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such offence may carry or attract. Guided by the public policy which such immunity has elicited, it appears necessary to underscore the point that immunity is available in different modes and applies to classes of officials irrespective of whether they operate in the executive,³⁷ legislative³⁸ or judicial branches. Primarily, Immunity is said to mean³⁹ "any exemption from a liability or service of process; especially such exemption granted to a public official."⁴⁰ Immunity is also said to mean "the condition of being free from some liability to which others are subject, e.g., the immunity of a judge in respect of things done or said when exercising his judicial function."⁴¹ The point

Apart from immunity conferred on the President, the Vice President, Governors and their Deputies, there are other statutes which imbue the executive branch from disclosure of certain documents. In that connection, sections 166, 167, 174 of the Evidence Act preclude the disclosure of documents which are considered not to be in the public interest. Again section 219 of the Evidence Act provides that "The Minister in respect of matters to which the executive authority of the State extends, the governor or any person nominated by him may in proceedings object to the production of documents or request the exclusion of oral evidence, when after consideration he is satisfied that the production of such document is, or the giving of such oral evidence, is against public interest... An objection whether by affidavit sworn by the Minister, or by certificate under his hand shall be conclusive and the court shall not inspect such documents or be informed as to the nature of such oral evidence but shall give effect to such affidavit or certificate."

1. The Legislative Houses (Powers and Privileges) Act, Cap. 208 LFN, confers immunity on every member of a legislative house against any civil or criminal proceedings in respect of any speech, report, petition, motion, resolution or Bill introduced, initiated or made in proceedings before the House or any of its committees. In addition, no member of a legislative House is liable to arrest or imprisonment or any form of civil or criminal proceeding or damages by reason of any thing said in the House or by reason of any matter, thing or conduct relating to a debate, motion, resolution, Bill, petition or whatever process before the House. Immunity is similarly conferred in respect of service of civil or criminal process on any member during proceedings of the House. Leave of the House may in respect of criminal processes be obtained to enable a member of such House receive the process.
2. See generally Abimbola A. Olowufoyeku: *Law of Judicial Immunities in Nigeria*, Spectrum Law Series, 1992 Akinola Aguda, Gen. Ed.
3. See *Black's Law Dictionary*, 7th edition, p. 752.
1. See *Osborne's Concise Law Dictionary*, 7th edition, p. 172.

must therefore be made at the earliest opportunity that there are many other types of immunity prevalent under the law. For instance, contractual immunity may arise by virtue of exemption clauses, while specific statutes may confer other species of immunity. As a matter of general interest, it is necessary to note that diplomatic and consular officers are by extant International Instruments and Conventions immune from criminal process. Similarly, sovereign countries, heads of states and government, including sovereign states cannot be impleaded in foreign courts except the suits are of a commercial character.⁴² Of course, there are several jurisdictions all over the world where the Attorney General has power either statutory or otherwise, to confer immunity from criminal process. For instance, in several of the states in the United States of America (the U.S.) a prosecutor has lawful authority to negotiate a plea bargain which ultimately may enable an accused person to plead guilty to a lesser charge carrying lesser punishment. Furthermore, a key accused person who helps investigation or the prosecution to solve a major crime may in exchange for invaluable testimony be offered immunity from prosecution. The case of *Turner v. DPP*⁴³ is instructive on this point. In that case, Turner whose accomplice in a robbery was offered immunity from prosecution in exchange for damning testimony, brought an action to prevent the Director of Public Prosecutions from taking over private prosecution which he (Turner) sought to initiate against his said accomplice. The question before the trial Judge was whether Turner should be allowed to continue prosecution which would have the effect of punishing an accomplice to a crime whose cooperation, during investigation was total. The court held:

⁴². The case which sparked the turnaround in the law appears to be Lord Denning's dissent in the much celebrated *Rahimtoola v. Nizam of Hyderabad* (1958) A. C. 379. See also the *Trendex case* (1974) Q.B. 1978. Denning is said to have inspired the State Immunity Act, 1978.

⁴³. (1978 68 C. App. R. 70).

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“that such a result or even the threat of it would obviously have grave consequences so far as the administration of justice is concerned. I do not need to spell out in detail the effect on future criminal investigations or proceedings if a witness giving evidence for the prosecution in these circumstances could not rely on the undertaking of the Director of Public Prosecutions and his cooperation in ensuring that such a witness would be protected against private prosecution of this kind.”

There is an undoubted right inherent in the powers conferred the Constitution on the Attorney-General to institute and undertake criminal proceedings to offer this kind of immunity. Again, his power to take over and continue any such criminal proceedings that may have been instituted by any other authority person signifies conclusively that criminal proceedings are not initiated at the instance of the Attorney-General alone. Accordingly, there are several statutes which enable other persons or authorities (with or without the consent or concurrence of the Attorney-General) to initiate criminal proceedings.⁴⁴ The common thread that runs through criminal proceedings, irrespective of the person who initiates it, is that the State asserts its undoubted power to prosecute offenders and to inflict punishment in appropriate cases. As has been noted elsewhere⁴⁵ “a prosecution exists where a criminal charge is made before a judicial officer or tribunal,⁴⁶ and any person who

See for instance, National Drug Law Enforcement Agency Act, Cap. N 30 LFN 2004; Economic and Financial Crimes Commission Act, No. 5 of 2003; National Agency for Drug Administration and Control Act, Cap. N 1 LFN 2004; Money Laundering Act, Cap.M18 2004; section 24(2) of Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994; etc.

See *Halsbury's Laws of England*, 14th edition. Vol. 45, para. 1342

See *Austin v. Dowling* (1870) L.R. 5CP 534 at 538.

makes or is actively instrumental in the making or prosecution of the charge is deemed to prosecute it, and is called the prosecution."⁴⁸ The decision to prosecute which is made by a prosecutor, such as the Attorney General is not an easy one. In that light, Sir Elwyn Jones who was one time Attorney General of Britain noted with emphasis that:

"The decision when to prosecute, as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is thought desirable to prosecute. Sometimes, there are reasons of public policy which make it undesirable to prosecute the case. Perhaps, the wrongdoer has already suffered enough. Perhaps the prosecution may enable him present himself as a martyr. Or perhaps he is too ill⁴⁹ to stand his trial without great risk to his health or even to his life. All these factors enter into the consideration."⁵⁰

In a great debate in the British House of Commons, Sir Hartley Shawcross noted that "the truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General ... it has never been the rule in this country - I hope it never will be - that suspected criminal offences automatically be the subject of prosecution. The public

■7. *Danby Becodisley* (1880) 43 L.T. 603.

■8. *Davis v. Noak* (1817) 1 Stark 377.

■9. Presidents Pinochet and Slobodan Milosevich, Chile and Bosnian strongmen respectively are clear examples.

■10. See *Cambridge Law Journal*, April 1969, p. 49 cited in *Githungiu v. Republic of Kenya* (1986) LRC (Const.) 618.

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... is the dominant consideration."⁵¹ In the same vein, the Supreme Court of Nigeria in *Abacha v. the State*,⁵² held that information alone is not enough to justify preferring a charge against a person. There must be evidence linking the suspect with the offence. There ought to be some evidence, however remote, which calls for some explanation from the suspect. At the step of deciding whether to prefer a charge the prosecutor is not obliged to act as a trial Judge should, whether the available evidence is sufficient enough to justify a conviction. But there must be sufficient evidence to meet all the essential elements of that offence. If on a fair appraisal of the available evidence there is absence of any necessary ingredient of the offence, the Judge who is required to obtain his consent to the preferment of the information should refuse to do so.

The case of *Bamaiyi v. Attorney-General of the Federation and Ors.*⁵³ is ample warrant for the conclusion that in deciding whether or not to prosecute, the Attorney General may resort to the setting up of an Investigating Panel. *Akpabio* JCA stated categorically that:

"in view of the wide powers of the Honourable Attorney General of the Federation contained not only under sections 174 and 150(1) of the 1999 Constitution, but also under common law and inherent powers, I am of the respectful view that the Honourable Attorney-General of the Federation had power to set up an SIP if he needed one."⁵⁴

Quoted in *Githungiu v. Republic of Kenya*, *op cit.*, at p. 625. See also *Ikomi v. the State* (1986)3 NWLR (Pt. 28) 340.
(2002) 11 NWLR (Pt. 779) 437.
(2000) 6 NWLR (Pt. 661) 421.
At p.461 para. C. D.

*"should decline to receive orders from the Prime Minister, or Cabinet or anybody else he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General as Head of the Bar is satisfied that a case for prosecution is against him. He should receive orders from nobody."*⁵⁹

In *State v. Garba (In Re: Mr. J.B. Maigida Solicitor General, Kaduna)*,⁶⁰ the Federal Court of Appeal (as it then was), expressed displeasure at the attitude of the High Court of Kaduna State which issued an Order which had the effect of compelling the Attorney-General and the Solicitor-General respectively to appear in court and to continue with the prosecution of criminal cases, even though both officers were not so disposed. In the opinion of the court:

"A judge could invite but not order the Attorney-General or the Solicitor-General to appear as *amicus curiae*. As a matter of courtesy and cooperation, such an invitation is invariably honoured ... It is not the function of the court to give order or command any of the officers through whom the Attorney-General may exercise the powers conferred on him by the Constitution..."

In the celebrated case of *State v. Ilori*,⁶¹ Eso JSC (as he then was) put this issue beyond dispute when he said that:

⁵⁹. House of Commons Debates, Vol. 188 Cos. 2105 - 2106, December 1st 1925 cited in *The Encyclopaedia of the Laws of the Federal Republic of Nigeria*, 1st edition, LEP, Nwamara (ed.) p. 363.

⁶⁰. (1985) 6 NCLR (Vol. 6) 193, 200.

⁶¹. (1983) 2 SC. 155; (1984) 5 NCLR (Vol. 5) 40.

“The pre-eminent and incontestable position of the Attorney-General, under the common law, as the chief law officer of the state, either generally as a legal adviser or specially in all court proceedings to which the state is a party, has long been recognized by the courts. In regard to these powers, and subject only to ultimate control by public opinion and that of the parliament or the legislature, the Attorney-General has, at common law, been a master unto himself, and under no control whatsoever, judicial or otherwise *vis-à-vis* his powers of instituting or discontinuing criminal proceedings. These powers of the Attorney-General are not confined to cases where the state is a party. In the exercise of his powers to discontinue a criminal case, or to enter a *nolle prosequi*, he can extend it to cases instituted by any other person or authority. This is a power vested in the Attorney-General by the common law and is not subject to any court of law. It is, no doubt, great ministerial prerogative coupled with great responsibilities.”

As a check however, the Constitution provides that the Attorney-General's prosecutorial powers must be exercised, having regard to public interest, the interest of justice and the need to prevent abuse of legal process.

It is also the presumption that the chief executives protected by the Constitution are granted such protection on grounds of public policy. That this is so is not in doubt. Professor B.O. Nwabueze is perhaps, the most emphatic African voice on this

point.⁶² It is his opinion that the immunity granted to the President, for instance:

“... is for the office and not for the man... It is the majesty and dignity of the nation that is at stake. To drag an incumbent President to Court and expose him to the process of examination and cross-examination cannot but degrade the office. The affront to the nation involved in this could be more easily perceived if it is imagined that a foreigner temporarily resident in the country were to take its President to court for, say, a breach of contract, and attempt to discredit him in cross-examination as a liar and disreputable person.”

The learned Professor further argues that:

“it makes no difference that the complainant is a national. The interest of the nation in the preservation of the integrity of its highest office should outweigh the inconvenience to the individual of the temporary postponement of his suit against the President.”⁶³

Professor Nwabueze adds a rider that may please opponents of this species of immunity when he notes that:

“... the immunity prevails only during his incumbency. It is thus a procedural immunity only, and in no way removes his liability, which

52. See B.O. Nwabueze, *Presidentialism in Commonwealth Africa*, C. Hurst & Company, London in association with Nwamife Publishers, Enugu; Ch.5. Also see B.O. Nwabueze: *The Presidential Constitution of Nigeria*, C. Hurst & Company, London; Ch.5, particularly, pp. 80 - 83.

53. *Presidentialism in Commonwealth Africa*, *op. cit.* p. 120.

*becomes enforceable again in the ordinary mode of proceedings at the end of his term of office, without any limitation as to time for the period covered by his incumbency.*⁶⁴

The extent and scope of the immunity granted to the chief executives named in the 1999 Constitution (and in similar pieces of legislation preceding the Constitution) came up for scrutiny in the well-received decision in *Abacha v. Fawehinm.*⁶⁵ Although in that case the primary question was whether the Federal Military Government could by Decree withdraw from its Treaty obligations under the African Charter on Human and Peoples Rights,⁶⁶ the court nevertheless found room to comment on immunity. It (the court) confirmed that:

“the immunity provided for does not apply to the person in question in his official capacity or a criminal or civil proceeding in which such a person is a nominal party. The immunity is to protect such a person while in office from harassment of his person while in office for his action done in his private capacity before or during his tenure of office.”

In fact in the present case, the suit is against the Head of State and Commander in Chief of Armed Forces (General Sani Abacha) and it is in respect of his alleged action in his official capacity. The immunity provided for in the Constitution does not arise and does not apply.”⁶⁷ Again, in *Alamiyeseigha v.*

64. *Ibid.*

65. (2000) 4 S.C. (Pt. II); (2000) 6 NWLR (Pt. 660) 228.

66. See African Charter on Human and Peoples Rights, Cap. 10. Laws of the Federation of Nigeria, 1990.

67. Italics ours, for emphasis.

Yelwa,⁶⁸ a case which came up before the Court of Appeal, it was the responsibility of that court to explain the rationale for the immunity conferred on a sitting Governor by the extant Constitution. The Court held that:

“... The intendment of the section is to bar any proceedings, civil and or criminal which will have the effect of interfering with the running of the office to which any of them was elected. To be entitled to immunity under section 308 of the Constitution, it would not matter whether any of the office holders was a party to the suit or not. It is the interference and the effect of the order sought (against them) from the court that the Constitution prohibits.”⁶⁹

In that case, some of the respondents to the appeal, had approached the Federal High Court (by motion *ex parte*) praying for leave to apply for an order to bring an application for *mandamus* to compel the Chief of Air Staff to dismiss the appellant from the service of Nigerian Air Force, or to refer him to a court martial to be tried for the offence of cheating in an examination at the Command and Staff College in 1991 while still in service. The Federal High Court granted the leave sought and the records indicate that a Motion on Notice was subsequently filed and served on the said Chief of Air Staff who however did not defend the suit whereupon the orders sought were granted. When the appellant (who by then was already serving as Governor of Bayelsa State) got wind of the proceedings, he filed an application in which he sought to set aside both the leave and the order of *mandamus* made by the court on grounds that the applicants lacked the *locus standi* to

68. (2000) 7NWLR (Pt. 767) 581.
69. Pp 599 - 600, paras. G -A.

bring the application and that the court itself was bereft of the jurisdiction to make the orders. It was also contended on the appellant's behalf that the applicants who prayed for an order of *mandamus* conceded the fact that the order was for enforcement against a serving Governor who was protected by the provisions of section 308 of the Constitution. The arguments were treated as fanciful by the Federal High Court but were upheld upon appeal to the Court of Appeal. It is not difficult to fathom that *Alameiyesegha's case*⁷⁰ is quite instructive. The embarrassment which either a retrospective or retroactive dismissal from the Nigerian Air Force or an on-going trial before a Court Martial would occasion for a serving Governor is better imagined than told and this falls within the umbrella of the rationale for immunity offered by Professor Nwabueze.

The other case, *Fawehinmi v. Inspector General of Police & 2 Ors*⁷¹ throws up a somewhat different perspective to the nature of the immunity conferred by section 308 of the Constitution. The question in that case was whether the immunity now under consideration protects a Governor (against whom allegations of criminal conduct was made) from investigation by the Police. Attention was drawn to the fact that pursuant to provisions of the Police Act,⁷² it is the position that the:

“...Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged...”

See fn. 53.

(2002) 7 NWLR (Pt. 767) 606.

Cap. 359, Laws of the Federation of Nigeria, 1990; section 4.

It was contended that to shield any political office holder from investigations would mean that such an officer would be put above the law. The Supreme Court in an emphatic judgment held that neither the law nor the Constitution protects any person from being investigated by the Police. The outcome of the investigation or the use made of it is an entirely different kettle of fish. The opinion of *Uwaifo JSC*⁷³ merits some extensive excerpts. He said:

“That a person protected under section 308 of the 1999 Constitution, going by its provisions, can be investigated by the police is, in my view, beyond dispute.”

Notwithstanding the fact that the Court held that the Police could investigate allegations of criminal conduct levelled against any person including a serving Governor, the Court declined the invitation to make the order of *mandamus* sought. The Court noted that:

“The Police have discretion whether or not to conduct investigation into any allegation of crime made to them. And the Court will not interfere if on the facts of a particular case, the discretion is properly exercised. There is therefore nothing in section 4 of the Police Act which denies the Police of any discretion whether or not to investigate any particular allegation, or when they decide to investigate, to do so to its logical conclusion. Thus the Police have discretion in appropriate circumstances in the way they carry out their duty. The need to exercise a discretion in such a matter may arise from a variety of reasons or

⁷³. At p. 682, paras. B - H.

circumstances, particularly having regard to the nature of the offence, the resources available, the time and trouble involved and the ultimate end result. It may well be balancing options as well as weighing what is really in the public interest. The discretion is not limited to the method of enforcement of Police powers. Thus it is inconceivable that such wide powers and duties of the Police must be exercised and performed without any discretion left to the responsible police operatives. Therefore, when so exercised, it is only in very obvious and exceptional circumstances that the court may interfere with the discretion.”

Similarly, in the equally recent case of *Tinubu v. IMB Securities Plc*,⁷⁴ the issues which came up before a full panel of the Supreme Court for decision were two fold namely, whether a beneficiary of the immunity granted by section 308 of the Constitution could waive same, and what the proper order a court should make upon finding that a case pending before it amounted to an infringement of the provisions of the aforesaid section. Having regard to the issue of waiver, Iguh JSC, who delivered the judgment of the Court was emphatic when he held that:

“The immunity granted to the incumbent of the relevant office under section 308 (1)(a) of the 1999 Constitution prescribes an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against any person to whom that section of the Constitution applies during the period he holds such office. Therefore no question of waiver of the relevant immunity by the incumbent of the offices concerned or, indeed, by the courts will arise.”

74. (2001) 16 NWLR (Pt 740) 670.

On the second point, the Court held that the proper order was not one adjourning the offending proceeding *sine die*, but an order striking out the proceedings, with liberty to relist same after the party has ceased to occupy his office. However, it may be pointed out that there was slight disputation among the Justices of the Supreme Court on the matter as to whether an adjournment, *sine die*, amounted to a continuation of the proceedings. To this end, *Karibi- Whyte*, JSC (as he then was) held as follows:

“In my considered opinion, a fair, correct and acceptable construction of the expression ‘no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office’ in section 308 (1)(a) of the 1999 Constitution must take into account the application of the prohibition the disqualification of and limitation by the words of the prohibition. It seems to me obvious that the qualification and limitation by the expression, prohibit the institution of or continuing an action during the tenure of the persons mentioned in section 308 (3). The construction is justified by the qualification of the prohibition by section 308 (1) (a) and limitations for its application to persons stated in section 308 (3).

It is important to consider the etymological meaning of the word ‘continued’ in section 308 (1) (a). This is neither a technical term nor a word of art, and to my understanding has not acquired a technical meaning. The ordinary plain dictionary meaning of the word ‘continue’ is ‘maintain’, ‘keep up,’ ‘not cease,’ ‘resume,’

'prolong,' 'remain,' The expression 'continued' is the antonym of the word 'discontinue.' The meaning of the word 'discontinue' is 'cease,' 'cease from', 'give up'. What gives the expression force is the peremptory word 'shall' with the negative 'not'. Both of which prohibit continuance:

The word "discontinuance" has acquired a technical meaning with a procedural requirement involving legal consequences to the person who has initiated the action. See the decision of this Court in *Aghadiuno v. Onubogu* (1985) 5 NWLR (Pt. 548) 16 SC. It seems to me that the prohibition that the pending action 'shall not be continued' is a direction to the court and necessarily to the plaintiff."

Stricto sensu, section 308 (1)(a) therefore enables the cessation *pro tempore* of proceedings instituted against persons mentioned in section 308 (3) of the 1999 Constitution during the tenure of their office. It is not a requirement permanently depriving the aggrieved the right to institute actions or continuing with pending proceedings. It is therefore in my considered opinion permissible for a court seised with a matter requiring the application of section 308 (1) (a) in the exercise of its judicial discretion in compliance with the Constitutional requirement to adjourn the pending proceedings appropriately. Accordingly, such proceedings may be adjourned to a convenient future specified date outside the prohibited period, or sine die as it deems fit with liberty to the plaintiff to apply to restore the proceedings to the cause list."⁷⁵ Notwithstanding the not so material disagreement, *Mr. Justice Karibi-Whyte's* consideration

75. At p. 712-713, paras E-F; Italics, for emphasis only.

the import of section 308 of the Constitution appears helpful
l bears repeating. He said:

“The interpretation of sections of the Constitution should be guided by the facts of the case. Appellant in the instant case was the defendant. The provisions of section 308 speak of civil action or criminal proceedings instituted or continued against a person to whom the section applies during his period of office. The provision goes on to preclude arrest or imprisonment, and issuance of process *requiring or compelling appearance of such persons. There is no suggestion that such persons can institute action against other persons, who cannot apply for processes against them. The provision of section 308 is a policy legislation designed to confer immunity from civil suit or criminal process on public officers named in section 308 (3) and to insulate them from harassment in their personal matters incurred before election. It follows from such immunity that such persons will not be involved in ordinary transactions that will necessitate resorting to the institution of civil suits or criminal actions.*

The text of section 308 is explicit and conclusive. The liberal approach to the interpretation of our Constitution counselled in *Nafiu Rabiu v. The State (1988) 12 NSCC 281*, does not encourage reading the provisions to neutralize the public policy principle protected by the provision. It has never been allowable and the sacred obligation of the courts is not to construe any of the provisions of the Constitution to defeat the obvious ends the Constitution was designed to serve. To construe

the provisions of section 308 in the manner suggested and thereby enable the persons named in section 308 (3) to exercise the right to sue in addition to the absolute immunity conferred on them while in office by section 308 (1) (a) will defeat the immunity designed by the Constitution, and lead to manifest injustice.”

The immunity which enures for the benefit of Chief Executives by virtue of the provisions of the Constitution under consideration, may be subsumed under the general rubric of what has been classified as public interest immunity.

The Exception

It has been held in several cases and it should therefore be accepted as a general principle, that election petitions are *sui generis* and can neither be classified as civil nor criminal proceedings. For that reason, the Supreme Court held in *Chief Collins Obi v. Chief Samuel Mbakwe & 2 Others*,⁷⁶ that:

“election petitions are special proceedings completely divorced and separated from civil proceedings within the context of section 267 of the Constitution, 1979. Consequently, a Governor of a State is not immune, by reason of section 267 of the Constitution from legal proceedings against him in respect of an election petition.”

In the more recent case of *Alliance for Democracy v. Peter odele Fayose*,⁷⁷ Mika’ilu, JCA while concurring with the lead judgment of Muri Okunola, JCA, noted that:

(1984) 15 NSCC 1277; (1984) 1 SCNLR 192.
(2004) 8 NWJL R. (P. 876) 639 esp. p. 653 paras E-H.

“The issue can be resolved by a simple question as to whether a person declared and sworn-in as governor elect can be sued by appropriate party to challenge the declaration. By law the answer must be in the positive. If the said person is said to be immuned under the section the resultant effect is that once a person is declared and sworn in as governor-elect that ends the matter, no one can complain or take any legal action even if the person conducted any gross malpractice. This will encourage gross wrongful and illegal activities among parties contesting for the position. This would undoubtedly negate the necessary intendment of our Constitution and would destroy the democracy itself. In election petition where the status of the governor is being challenged, as in this, then the said immunity is also questioned. He has no immunity against being sued and consequently he cannot be immuned from being subpoenaed. It must be made clear that the provisions of section 308 of the Constitution are applicable to ordinary civil proceedings as in the case of *Tinubu v. IMB Securities Limited (supra)* and criminal proceedings and not in election related matter as in *Obi v. Mbakwe (supra)* and our present case. In my judgment the appeal is to be allowed on this issue.”

The petition filed by a presidential candidate against the incumbent president which necessitated the President, Chief Olusegun Obasanjo, stepping into the witness box as a witness lays to permanent rest, the controversy as to whether the President or the Vice-President, the Governor or a Deputy-Governor, may claim immunity in respect of election petitions.

The case is reported as *Ojukwu v. Obasanjo*, and it is clearly disclosed in the lead judgment delivered by *Salami*, JCA that:

“The second petitioners witness Chief Obasanjo, testified that between 14th February, 1976 and 30th September, 1979 he was the military Head of State of Nigeria, Commander-In-Chief of the Armed Forces...”

The President, in addition, was duly cross-examined. Having regard to the fact that the President testified for the second petitioner, it appears consistent with practice to conclude that he was compelled to attend the tribunal as a witness, in which case, the President would have submitted to the process of court. Clearly then, election petitions stand out as exceptions to the immunity of the President from the process of a duly constituted tribunal.

Quite recently, controversy has arisen over the possibility of arraigning before the Code of Conduct Tribunal, certain Governors on the allegation that they maintain foreign accounts contrary to provisions of the Constitution. Opinions are divided as to whether proceedings before the Code of Conduct Tribunal are covered by the immunity provisions of the Constitution considered above. On the one hand, there are arguments indicating that proceedings before the Tribunal ought not to be considered as falling within the scope or ambit of the civil or criminal proceedings for which immunity is afforded the office of Governors but should be seen as falling in the category of election petitions. On the other hand, the argument is that a conviction by the Code of Conduct Tribunal carries severe penalties and consequences and to that extent, a Governor ought to be able to avail himself of immunity as prescribed by the Constitution.

In pursuing the argument one way or the other, attention must be drawn to section 7 of the Code of Conduct Bureau and Tribunal Act (which provides that:⁷⁸

“Any public officer specified in the Second Schedule to this Act or any other persons as the Armed Forces Ruling Council, (now National Assembly) may from time to time, by order prescribe shall not maintain or operate, a bank account in any country outside Nigeria.”

Equally relevant is section 23 of the same enactment which specifies the punishment the Tribunal may impose on the public officer found guilty of a contravention of the provisions of the Act. Accordingly, section 23(2) provides that the punishment which the Tribunal may impose should include the following:

“(a) vacation of office or any elective or nominated office, as the case may be; (b) disqualification from holding any public office (whether elective or not) for a period not exceeding ten years; and (c) seizure and forfeiture to the State of any property acquired in abuse or corruption of office.”

In point again is the provision of sub section (3) of section 23 which provides that the punishments mentioned above shall be without prejudice to the penalties that may be imposed by any law where the breach of conduct is also a criminal offence under the Criminal Code or any other enactment or law. Finally, it is provided in section 23(4) of the Act that:

78. Cap. 56 LFN 1990)

“where the Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provisions of this Act, an appeal shall be as of right from such decision or from any punishment imposed on such person to the Court of Appeal at the instance of any party to the proceedings.”

It must be noted, that there are ample authorities indicating that for the purpose of election petitions, immunity does not apply to any of the parties to the petition.⁷⁹ The rationale is obvious and it is that both Petitioner and Respondent in an electoral dispute must have a level playing field and that allowing one of the disputants to enjoy immunity means that the outcome of the petition is pre-determined. That is to say that once the Governor is sworn-in, irrespective of how he won, his immunity will shield him.⁸⁰ This position is definitely different from the problem created by a hearing before the Code of Conduct Tribunal. Surely, a Governor whose election is adjudged irregular cannot complain if the election is voided⁸¹ but to impose the punishment provided for in the enabling Act for a breach of a code of conduct involves the kind of proceedings envisaged by section 308 of the Constitution and as such it is our considered view that proceedings before the Code of Conduct Tribunal qualify as civil proceedings *simpliciter*.

There are yet other developments that tend to suggest an attempt to side-step the immunity granted executive office holders. It is a notorious fact that the Vice-President has of recent been at daggers-drawn with the President. An investigation by the Economic and Financial Crimes Commission (EFCC) found the Vice-President culpable in certain respects

79. See foot notes 60 and 61.

80. See foot note 61

81. See *Ngige v. Obi* (2006) 14 NWLR (Pt. 999). This is perhaps the first case in which an incumbent Governor lost his office through an election petition.

with regard to the alleged mismanagement of a government concern – the Petroleum Trust Development Fund (PTDF). The Agency presented its report on its investigation to the Federal Executive Council (FEC). The Federal Executive Council in turn, set up an Administrative Panel to inquire further into the EFCC report. The Panel indicted the Vice-President and also submitted the reports to the National Assembly which has also resolved to investigate the PTDF. In addition, charges have been filed at the Code of Conduct Tribunal against the Vice-President. The Vice-President has challenged these developments in court and the outcome is being awaited. The resort to the law courts is to test the efficacy of the provisions of section 137(1)(i) which disqualifies the Vice-President from contesting election to the office of the President if “he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunal of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively.” Whether this is a booby trap or a Constitutional *Catch 22* remains to be seen.

The Executive Team Ticket

As has been stated, the Constitution requires a person who seeks the office of President or Governor in an election to nominate another candidate as his associate from the same political party who is to occupy the office of Vice-President or Deputy-Governor as the case may be. It has also been noted that unless such associate is nominated, the prior nomination of the Presidential or Governorship candidate is invalid. The relevant question is whether the joint electoral ticket of President and Vice-President or Governor and Deputy-Governor makes them inseparable Siamese twins. There are several ways in which this question has presented itself for judicial resolution. The first test was presented by *Peoples Democratic Party & Anor v.*

*Independent National Electoral Commission & 4 Others.*⁸² In that case, the present Vice-President was shown to have originally contested election for the office of Governor of Adamawa State together with the 2nd Appellant, Boni Haruna (now Adamawa State Governor). The election was in their favour. However, before being sworn-in as Governor and Deputy Governor respectively, the person elected as Governor (present Vice-President) was nominated as Vice-Presidential candidate by the present President and was later elected. The 1st Respondent, INEC, made preparations for the conduct of fresh elections to the Governorship and Deputy-Governorship of Adamawa State. The 2nd Appellant (Boni Haruna) together with the political party which sponsored him approached the High Court to restrain the Independent National Electoral Commission from conducting fresh elections having regard to the fact that the 2nd appellant had been elected as Deputy-Governor and was available to be sworn-in in the light of existing legislation guiding the conduct of elections. The relevant statute which called for interpretation was the State Government (Basic Constitutional and Transitional Provisions) Decree.⁸³ It provided as follows:

“subject to the provisions of this Decree, a person shall hold office of the Governor of a State until:

- (a) when his successor in the office takes the Oath of that office;
- (b) he dies whilst holding office;
- (c) the date when his registration takes effect; or
- (d) he otherwise ceases to hold office in accordance with the provisions of this Decree.⁸⁴

82. (1999) 11 N.W.L.R (Pt. 626) 200.

83. No. 3, 1999.

84. Section 36 of the Decree.

Another important provision of the Decree which called for interpretation was section 37 thereof which provided that:

“37(1) if a person duly elected as Governor dies before taking and subscribing the Oath of Allegiance and Oath of office, the person elected as Deputy shall be sworn in as Governor and he shall nominate a new Deputy-Governor from the same Senatorial District⁸⁵ as that of the deceased Governor who shall with the approval of the House of Assembly of the State be appointed as Deputy Governor;

“(2) where the persons duly elected as Governor and Deputy-Governor of a State die before the inauguration of the House of Assembly, the Commission shall immediately conduct an election for a Governor of the state in which the candidates shall be nominated from the same Senatorial District as those that produced the Governor and Deputy-Governor who have died.”

Having regard to those and other provisions of the Decree, the Supreme Court⁸⁶ held as follows:

“There are three stages or phases in the process of a person contesting election to become a Governor or Deputy-Governor, viz:

85. Section 181(1) of the Constitution is identical with this section save for the omission of ‘Senatorial District’. The Constitution allows a discretion for the appointment of a new Deputy-Governor subject to the concurrence of the House of Assembly of the State concerned (by a simple majority).

86. The Supreme Court was split 4-3, Ogundare, Uthman Mohammed and Uwaifo JJ.S.C dissenting.

- (a) The first stage is before and up to the holding of the election. During this period or stage, if the gubernatorial candidate dies or withdraws from the election or is permanently incapacitated, there has to be a fresh nomination of both a gubernatorial candidate and his running mate. On the other hand, if the running mate suffers the same disabilities, *the gubernatorial candidate alone is not qualified as such.*⁸⁷
- (b) The second stage is after having been elected but pending the assumption of office. This is the period that section 37(1) of Decree No. 3 of 1999 provides for. In that provision there is no express provision about other events such as resignation, impeachment, permanent incapacity etc, as mentioned in section 45(1) of the Decree.
- (c) The third stage is the assumption of the office of Governor or Deputy-Governor after declaring his assets and taking the prescribed oaths. In this stage, section 45(1) of Decree No.3 of 1999 specifically provides the eventualities upon which the Deputy-Governor will succeed the Governor.⁸⁸

Uwais, C.J.N (as he then was) who wrote the lead judgment (with which Wali, Kutigi and Ayoola JJ.S.C) concurred held that:

“For the purpose of contesting gubernatorial election under Decree No. 3 of 1999, the interests of a gubernatorial candidate and those of his

87. Emphasis, ours.

88. See p. 240, paras C-H of the reports.

running mate, that is, the candidate for election to the office of Deputy-Governor, are joint and inseparable. They swim or sink together at the stage of contesting the election as the gubernatorial candidate cannot stand for the election without a running mate and vice-versa. However, once the two-some succeed in being elected and are duly returned as so elected, they acquire rights under the Constitution that are joint as well as separate.⁸⁹

It is our view that the concurring opinion of Ayoola JSC, is somewhat more illuminating on this matter and merits an extensive excerpt. He said:

“The 2nd appellant who was deemed to have been elected Deputy-Governor cannot be deprived of that office by a fiat of INEC without express provision of the Decree empowering INEC so to do, nor would it be right to presume that the intention of the Decree is that in the event that had happened he should by reason of the act of the Governor-Elect declining to be sworn in as Governor, be deemed also to have abandoned his right, implicit in the Decree, to embark on his tenure, at least as Deputy-Governor.

For my part I am unable to accept as correct or just an interpretation of the Decree or a reading into the Decree by implication, anything that would work injustice to the person elected Deputy-Governor. The fallacy in the position taken by the respondents is in assuming that the Governor and the Deputy Governor swim or sink together for all purposes. It is clear

89. Emphasis supplied.

from the provisions of the Decree that although they *may swim or sink together for the purposes of winning an election*, once they have swam to the shore of electoral victory, they map out their independent fortunes which may include one of them deciding not to take the office to which he had been elected. Had the legislature wanted them to swim or sink together for all purposes, express provisions would have been made to that effect.

The absence of any provision empowering INEC to conduct an election for Governor when a Deputy-Governor was alive and had not declared an intention to renounce the executive office to which he has been elected and the retention of the provision of section 41(1) and section 96(1)(k) without any modification as a qualification to be met by a governorship candidate, raised a clear implication that the intention of the legislature was not to have an election to the office of Governor as long as there existed someone who could by his being elected Deputy-Governor step into office of the Governor. I cannot read section 41(1) and section 96(k) as implying that a person who has been elected to the office of Deputy-Governor should be deprived, at least, of the right of occupying that office. In my view, where a statute is capable of being read as upholding and preserving a right, it should not be read as taking away such right in the absence of express provisions to that effect.

Were the legislature to put its intention into words in such a situation as has arisen in this case there is no doubt, judging from the rest of the Decree in relation to the office of the Deputy-Governor, that it would have provided that the Deputy-Governor should be sworn in as Governor could 'die' by reason of physical death of the person elected as by his voluntary choice as had happened in this case. The whole tenor of the Decree, as has been said, is to ensure as far as possible, that there is always someone to assume or occupy the executive office of the State. That was why the office of the Deputy-Governor was created. To construe the Decree as depriving the Deputy Governor elect not

only of the expectation that he would be the person to be sworn in as Governor should the Governor elect decline to be sworn in, but also of occupying even the office to which he has been elected is to impute what is unreasonable to the legislature.

In the course of his oral argument before this court, Mr. Mahmoud, learned counsel for the 1st and 2nd respondents submitted that the 2nd appellant had no right. If he is understood as suggesting that a person who has won an election has no right which the law will protect, then, I feel no hesitation in holding that he is wrong. There are various classes of rights. There are proprietary rights and non-proprietary rights protected by public law. A person who is elected to an office acquires a right protected by public law to assume that office. It is a right which only persons elected have and which a person not elected does not have. It can only be taken away by clear and express provisions of the law. Any proposition that a person elected to a political office, such as that of the Deputy-Governor which is relevant to this case has no right, is not only fallacious but dangerous to the democratic process. To say that such person has no enforceable right to assume that office would strike at the very root of democracy and render the process of election a sham. A statute should not be read as impliedly removing a right which it had itself created. In this case, the Decree which has set out in several of its provisions the incidents of an election to the office of Deputy Governor cannot be interpreted as nullifying such incidents when there is no express provision to that effect. One of those incidents is that the person elected is entitled to commence his tenure of office. In my view, from the totality of the provisions of the Decree, discerning the spirit of the Decree therefrom, and considering the character of the Decree as one dealing with an important aspect of governance of the State in which a deadlock is undesirable, it was clear that this was a case in which, it was implicit in the Decree that to give efficacy to the Decree the Deputy-Governor elect should be sworn in as Governor where the desire of the Governor-elect to assume

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election as the Vice-President of the Federation, Alhaji Atiku Abubakar had renounced, by conduct, his election as the governor of Adamawa State. A vacancy was thereby created. I think the 1st Respondent was right when in its letter of 8th March 1999 it described the situation arising as creation of a 'void.'

PDP & Anor v. INEC & Others,⁹⁰ without question, represents the current position of the law having regard to the inseparability or otherwise of the executive team ticket. This is so because the provision of the Constitution with regard to the gubernatorial ticket is identical with the presidential ticket.⁹¹ In addition, the recent impeachment and removal of the Governors of Bayelsa, Oyo and Anambra States which led to the assumption of office of Governor by the erstwhile Deputy-Governors of those states leads to the inescapable conclusion that indeed, a Governor⁹² may in certain circumstances be separated from the Deputy-Governor. On this note, it is considered germane to dilate on the procedure for the removal of the President, Vice-President, Governor and Deputy-Governor from office. However, having regard to the fact that the procedure for the removal of any officer in the presidency is the same as that for the gubernatorial positions,⁹³ the Constitutional provisions touching upon the removal of a Governor or Deputy-Governor will be considered.

90. See footnote 82.

91. See sections 142 and 187, *Ibid*.

92. In Ekiti State, the Governor and Deputy-Governor were both removed from office leading to the swearing in of the Speaker of the House of Assembly as acting Governor. The Deputy Governor rejected her removal as unconstitutional and continued to operate in office leading to the declaration of a State of Emergency in the State. A Sole Administrator has since taken over the management of the affairs of Ekiti State and the Governor, the Deputy-Governor and the House of Assembly are on suspension.

93. See sections 143 and 188 of the constitution.

Removal of Executive Office Holders from Office

The procedure for the removal of a Governor or a Deputy Governor is provided for in section 188 of the Constitution. Subsections (1) - (9) of that section prescribe the procedural requirements while subsection (10) provides that:

“no proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.” In addition, the last subsection, (11), defines “gross misconduct” to mean ‘a great violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct. What the Constitution prescribes as a first step, is that whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly - is presented to the Speaker of the House of Assembly of the state; stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly. Any statement made in reply to the allegation by the holder of the office, is to be served on each member of the House of Assembly. What then follows is that the House of Assembly will have fourteen days to resolve by motion, without any debate whether or not the allegation shall be investigated. As prescribed by

the Constitution, a motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly. It must be emphasized at this point that the Constitution prescribes not less than two-thirds majority of all the members and this is significant. It is our view that the Constitution deliberately made the majority required for validating the resolution for investigating a Governor very stringent in order not to trivialize the affair nor make a mockery of our democratic process. Professor Ben Nwabueze, SAN, NNMA, affirms this view and states (with reference to the removal of the President and Vice - President) that "the procedure for the removal of the President or Vice-President by impeachment has been made extremely rigid in order to emphasize the gravity of the matter and to discourage a handful of disaffected members from embarking upon it for frivolous or purely partisan reasons." At the time the learned Professor wrote his famous book,⁹⁴ he could hardly have foreseen that a few years after and under nearly identical provisions in another Constitution,⁹⁵ legislators will use impeachment

94. See B.O. Nwabueze: *The Presidential Constitution of Nigeria*, C. Hurst & Company, London in association with Nwamife Publishers, Enugu, 1982, p. 143.

95. Section 170 of 1979 Constitution which dealt with the removal of Governor was identical with s. 188 under consideration save for s. 188(5) of the 1999 Constitution which gives the Chief Judge of a State the power to constitute a Panel to investigate the allegations. The variant in 1979 granted the power to the Speaker to appoint a Panel from the members of the House of Assembly.

provisions for purposes not contemplated by the Constitution including saving their own skins.⁹⁶

After the House of Assembly has decided by resolution the allegations against the Governor or the Deputy-Governor investigated, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of persons who in his opinion are of unquestionable integrity being members of any public service, legislative House, political party, to investigate the allegation.⁹⁷ In order to protect the Constitutional rights to a fair hearing, it is provided that the holder of an office whose conduct is being investigated shall have the right to defend himself in person or be represented before the panel by a legal practitioner of his own choice. It may be worthwhile to examine recent developments with regard to the exercise of the power conferred on the Chief Judge with reference to the Constitution of the panel of seven. In Ekiti State, the House of Assembly had served a notice on the Governor contemplated by section 188. The Chief Judge constituted a panel of seven as requested but the House of Assembly reacted negatively and suspended the Chief Judge from office based on allegations that some members of the panel were of dubious character. Accordingly, could not be considered as of unquestionable integrity.⁹⁸ Thereafter, the House of Assembly appointed another Acting Chief Judge' who constituted another

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96. There are unproven allegations that in Bayelsa State, the members of the House of Assembly moved against the Governor, Diepriye Alamiesiegha, on a threat by the Economic and Financial Crimes Commission (EFCC) to investigate them for alleged offences. In Plateau State where the House of Assembly is also attempting an impeachment of the Governor, similar allegations of self-preservation have been levelled against the pro-impeachment legislators.
97. See section 188(5) of the Constitution.
98. The House of Assembly alleged that most members of the Panel were the Governor's kinsmen or his cronies. One member, a retired Permanent Secretary, was allegedly making refunds of money to the State Governor having been found guilty of embezzlement of public funds while in service.

accepted to the House of Assembly. The second panel then found the Governor and Deputy-Governor guilty of the allegations of misconduct whereupon the House of Assembly removed both of them from office.

A few relevant questions arise for consideration. Firstly, if, as we seem to think, the Chief Judge is imbued with a discretion in the exercise of the power to constitute a panel of seven, does the House of Assembly have any reservoir of authority from which it can draw to curtail or deal with any abuse of the Chief Judge's discretion? Perhaps, what angered the House of Assembly was the fact that the panel cleared the Governor of all the allegations. It is our humble view that the Constitution has made no room for the Ekiti State House of Assembly to act as it did. Rather, section 188(8) is emphatic and provides that 'where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.'⁹⁹ Section 188(8) is in our view mandatory and automatically terminates the proceedings for the removal of the Governor. Accordingly, the second point to make is that at the time the House of Assembly purported to appoint an Acting Chief Judge, it had neither the Constitutional *imprimatur* to remove the Chief Judge nor the power to appoint any other person to act in his stead.¹⁰⁰ It must then be said that the Ekiti State House of Assembly acted in error when it purported to remove the Governor and his Deputy on the basis of a procedure which was flawed by inadvertence or outright disregard of provisions of the Constitution.¹⁰¹ It may also be assumed, based

99. Emphasis, ours.

100. Section 292(1)(a)(ii) of the Constitution makes provision for the removal of judicial officers from office (especially the Chief Judge) and the Governor can only exercise the powers vested therein by acting on an address supported by two-thirds majority of the House of Assembly of the State. See also s. 192(1)(b).

101. Recent trends such as this had triggered press outrage. A popular columnist, Dr Reuben Abati, has argued that "...the bigger absurdity is that across the country, it is assumed that what is going on in Ekiti is normal in Nigerian democracy. When you talk about illegality, your attention is drawn to Anambra and Oyo

on recent judicial impetus,¹⁰² that a challenge of the Ekiti State proceedings by a party interested may be successful.

States before now, and the fact that this is politics not law. One fellow in fact argued that he does not know why the Chief Justice of the Federation, Justice Modibbo Alfa Belgore is commenting on the matter in Ekiti. He was sure that not even the Supreme Court is in a position to protect the rule of law. He argued that we are running a gun-point democracy. If you stay in the line of fire, you'd be dead before you can get a chance to insist on your rights. And can dead men argue about rights? But what no one can deny, it seems, is that the situation in Ekiti has grown to the level of pure madness and anarchy. The Deputy Governor apparently has abandoned her boss, having sent her lawyer to appear before an illegal panel...there is information that the lawmakers are not acting out of any commitment to the common good but that they are playing out a script handed over to them by the EFCC which featured prominently before the new panel, with some witnesses in its custody. In Ekiti, there is real breakdown at all levels of government: the Executive is in the dock, the legislative is staging a coup against the other arms of government, the judiciary is divided and breaking the law, the people are confused and anxious...Anarchy is the appropriate word.

Dr. Abati continued in this vein:

The madness in Ekiti is matched only by the current absurdity in Plateau State, where eight lawmakers, acting under the influence of the EFCC are threatening to impeach the Governor, Joshua Dariye. When the Nigerian Constitution talks about 2/3rds majority of the legislature for the purpose of impeachment, it does not envisage a House made up of eight members but the full complement of the House in session. But nobody seems to be worried about this. It is strange that there are people in Plateau State who are also determined to remove the governor by illegal means if possible. But Dariye seems to have an advantage over Fayose, there are able-bodied youths in the state who are prepared to defend their Governor's mandate and they attempted to do so two days ago; unfortunately three of them were gunned down! Whoever wants to remove Dariye apparently has no respect for human lives. We run a gun-point democracy where the right to differ and the insistence on it is an open invitation to murder.

I don't want to be misunderstood. I am realistic enough to know that those who want to remove Fayose and Dariye will do so even if the Heavens fall. Nigerian democracy has produced a crop of buccaneers who have no regard for law and order. They are driven only by their goals, and even when there is merit to their position, their lack of decorum and decency destroys their arguments in the long run. The length of their conduct is the desire to win the argument with animal instincts and tactics. An animal in the wild is unconcerned about propriety. One form of illegality is used to eliminate another form of illegality as if we are in the wilderness." See *The Guardian*, Sunday, Oct. 15, 2006 p. 54.

102. A recent judgment of the Ibadan Division of the Court of Appeal, is warrant for the conclusion that proceedings under s. 188 is reviewable by the Courts in certain circumstances. See Appeal No. CA/1/21/2006. *Senator Rashidi Adewolu*

Before we highlight the new judicial attitude, a recourse to judicial history is necessary. Previous judicial attitude stemmed from the provision of section 170(10) of the 1979 Constitution which is identical to section 188(10) of the extant Constitution. Relying on that provision, the then Federal Court of Appeal (now Court of Appeal), in *Alhaji Abdulkadir Balarabe Musa v. Auta Hamza & 6 Others*¹⁰³ held (Per Adenekan Ademola JCA) that:

“This section has been popularly termed impeachment Section in relation to removal of the Governor and his Deputy from office. It is novel in the Constitution of Nigeria. It has its origin in the political thought and Constitutional law of medieval Europe and the Constitutional law of England in the 16th to 18th centuries. It was transplanted to the American soil during the settlement of the Colonies on that Continent. It was a powerful weapon in the hands of parliament in its fight against the King and the Executive in its desire to control and tame despotism from these quarters. It is now thought obsolete a method in getting rid of minister and servants of the King. But in our present situation in this country one must not discountenance its potentialities. In England the House of Commons is the accuser and the prosecutor before the House of Lords which tries the offender and hands down judgment. In the judicial set up in England, the House of Lords is the Highest Court. The law Lords take part in the proceedings in the House of Lords and this fact and other

Ladoja & 3 Ors v. Hon. Muyiwa Inakoju & 17 Ors (Judgment dated 1-11-06 is unreported). See also THISDAY, Vol. 2, No. 4217, Tuesday, Nov 7, 2006, p. 49 for an abridged report of the judgment. Now affirmed by the Supreme Court. 103. (1982) 3 N.C.L.R (Vol. 3) 229.

consideration may in my view be responsible for the lack of judicial control or interference in impeachment proceedings in the country...In Nigeria under section 170 of the Constitution, the whole exercise is begun by members of the House. Even the speaker who appoints the committee of seven persons to investigate the allegation against the Governor or his Deputy must have the approval of members of the House for his nominees. It is only when the committee reports that the allegation has not been proved that members of the House of Assembly are not called to finish the work it has begun. The whole exercise cannot be said to guarantee independence or objectivity and impartiality by the norms of section 33(1) of the Constitution. It is a trial by the Legislative organs of the State and the law it administers is *Lex Parliamenti* as section 170(11) lays down; such a law is hardly the ordinary law the normal law courts administer.”

His Lordship then argued that:

“The judgment the House gives is a Legislative judgment. Does such a judgment come in for a review by the ordinary courts of the land? That is where the true meaning and intendment of Section 170(10) comes in. The obvious end that section 170 of the Constitution was designed to serve is that the Governor or his Deputy could only be removed by the act and doings of the Legislature and Subsection (10) of it is put in to stop any interference with any proceedings in the House or the committee or any determination by the House or the committee. It follows from the premise of

this that no court can entertain any proceedings or question the determination of the House of the committee...It is a political matter...for the court to enter into the political thicket as the invitation made to it clearly implies would in my view be asking its gates and its walls to be painted with mud; and the throne of justice from where its judgments are delivered polished with mire."

In his own concurring contribution, Adolphus G. Karibi-Whyte JCA (as he then was) also said that:

"The Constitution is therefore not only the charter of government, but is also the anchor and ultimate refuge of the citizen. No rights or duties can be enjoyed or enforced except insofar as the Constitution allows...the exercise of the power under section 170 is not a power derived from an Act of the National Assembly or a House of Assembly but a power conferred on the House of Assembly by the Constitution...That the Constitution has vested the power to remove the Governor or Deputy Governor in the State House of Assembly is not questioned...I am satisfied that the moment the Legislature commenced removal proceedings under section 170(2), the jurisdiction of the court was ousted by section 170(10)...Where the Constitution has not vested in the courts any supervisory jurisdiction the court will be acting contrary to the spirit of the Constitution if it went on any inquiry into the manner Parliament had performed the functions assigned to it by the Constitution. No source of conflict between the different departments is greater than an interference of that nature. In the

circumstances I am of the opinion that the court cannot enter into such an enquiry. Not only because it has no jurisdiction to do so, but also essentially such an enquiry is productive of insoluble conflicts.”

The above dictum is from a case arising by virtue of the 1979 Constitution but nonetheless, the Balarabe case has since been the *locus classicus* on impeachment proceedings. That decision, not surprisingly has been followed in subsequent challenges to impeachments through the courts. Thus, in *Abaribe v. The Speaker, Abia State House of Assembly*,¹⁰⁴ Pats-Acholonu JCA (as he then was and now of blessed memory) held that:

“The Court should not however attempt to assume for itself power it is never given by the Constitution to brazenly enter into the miasma of the political cauldron and have itself badly bloodied and thereby losing respect in its quest to play the legendary Don Quixote de la Mancha. In its bid to embark on Impeachment Procedure, it is expected that the House of Assembly should not ride roughshod over the prescription of the law. Beyond exercising its judicial powers as conferred on it by the Constitution to ensure the equilibrium in the distribution of functions of the organs of the government, the Court should exercise utmost caution in invading the area that is prohibited by the Constitution, I cannot but quote here in extenso the ringing words of *Alhaji Abdulkadir Balarabe Musa v. Auta Hamza (1983) N.C.L.R. p. 229, p. 247* ‘Finally, at a time like this, let us remember the words of that great intellectual

104. (2000) F.W.L.R. (Pt. 9) 1425.

from the famous Harvard Law School who once sat as a member of the Supreme Court of America in a case which aroused much political emotion like this has done. Felix Frankfurter said in *Baker v. Carr* (1962) 369 US 186 thus: "The Court authority possessed neither of the purse nor the sword-ultimately rests on sustained public confidence in its moral sanction. Such feelings must be nourished by the Court's complete detachment, in fact and in appearance, from political settlements...' In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event, there is nothing judicially more unseemly nor more self-defeating than for this court, to make interrorem pronouncements, to indulge in merely rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope..."

However, late Justice Acholonu also enthused that

"Albeit the issue of impeachment is a political matter, the court at the same time may not close its eyes to series of injustice relating to the manner the Impeachment Procedure is being carried out. It is within the procedure of the court to ensure strict adherence to the spirit of the Constitution for the endurance of a democratic regime."

Instructively and in apparent hearkening to the voice of a deceased colleague, the Court of Appeal¹⁰⁵ in a unanimous decision has voided proceedings under section 188 of the Constitution which it held was not conducted in accordance with the imperatives and dictates of that section. The landmark case arose from the purported removal from office of the Governor of Oyo State, Rashidi Ladoja by eighteen of the thirty-two members of the State House of Assembly.¹⁰⁶ This awakening may be salutary in the interest of the rule of law and the sustenance of our fledgling democracy. However, despite the judgment of the Court of Appeal, the House of Assembly of Anambra State, the next morning, purportedly removed the Governor from office following which event the Deputy Governor was sworn in as the new Governor of the State. It appears that the Anambra situation replicated that of Oyo State in all material respects.¹⁰⁷ Plateau State is nearly on all fours except that at the time of preparing this piece, the Governor was still in office, perhaps waiting for the inevitable to happen.

The inevitable conclusion that may be drawn from the foregoing is that each case must be considered in the light of its peculiar circumstance i.e with regard to whether the Governor and Deputy Governor will swim or sink together. As a matter of fact, much will depend on the whims of the appropriate House of Assembly,¹⁰⁸ and the attitude of the Federal Government. The Federal Government has been mentioned in recognition of the

105. See fn 101.

106. Also fn 101.

107. See Front Page Story 'Court Voids Ladoja's Removal', *THISDAY*, Thursday, November 2, 2006, Vol. 11, No. 4212.

108. See *THISDAY*, Nov. 3, 2006, Vol. 11, No. 4213, Front Page reporting that "As at last night two men were calling the shots in Oyo State following the declaration on Wednesday by the Court of Appeal sitting in Ibadan that Governor Rashidi Ladoja was illegally impeached. In Anambra, 5 am yesterday, 11 out of 24 members announced in Asaba, capital of Delta State, that they had impeached Governor Peter Obi...while the drama continues, their 13 remaining colleagues ask that the run-away lawmakers be arrested and prosecuted for Treason?"

fact that its power and influence has all but rendered the states prostrate. Two examples will suffice. In respect of Oyo State, despite Governor Ladoja's victory at the Court of Appeal, the Federal Government has reportedly, advised him to remain at home pending the hearing and determination of an Appeal filed by his erstwhile Deputy (presently the *defacto* Governor) at the Supreme Court.¹⁰⁹ Again, despite public outcry against the Anambra situation, the Federal Government has endorsed the emergence of Dame Virgi Etiaba, erstwhile Deputy Governor, as Governor of the State.¹¹⁰ Whether the current gale of impeachments will continue or abate is now only within the realms of speculation.

Declaration of a State of Emergency

Part of the reality of our present political experience is that democratic structures (including the offices of Governor and Deputy Governor) are affected by the declaration of a state of emergency in any state of the Federation. The procedure for Declaration of a State of Emergency is provided for in section 305 of the Constitution. Particular attention shall be paid to subsections 1, 2 and 3 of that section as they are the subsections considered very material. Section 305(1) provides that 'subject to the provisions of this Constitution, the President may by instrument published in the official Gazette of the Government of the Federation issue a Proclamation of a state of emergency in the Federation or any part thereof'. As a follow up, it is further provided that 'The President shall immediately after the

109. In Bayelsa, Oyo and Anambra States, the Governors alone were impeached creating room for their respective Deputy Governors to become Governors. However, in Ekiti State both the Governor and his Deputy were removed resulting in the Speaker becoming the Acting Governor. The resulting confusion as already noted, led to the imposition of a State of Emergency in the State.

110. See *THISDAY*, Monday, Nov 6, 2006, Vol. 11, No. 4216, Front Page - 'FG to Ladoja: Wait for Supreme Court Decision: Also see, *THE GUARDIAN*, Vol. 23, No. 10, 209, Monday, Nov. 6, 2006 - 'Minister Stops Ladoja from Resuming Duties'; 'Alao-Akala Awaits Supreme Court's verdict'.

publication, transmit copies of the official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the proclamation.¹¹¹

Section 305 spells out the conditions that must exist before a state of emergency is declared. Thus, section 305(3) provides as follows:

"The President shall have powers to issue a proclamation of a state of emergency only when:

- (a) the Federation is at war;
- (b) the Federation is in imminent danger of invasion or involvement in state of war;
- (c) there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;
- (d) there is clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;
- (e) there is an occurrence or imminent danger, or the occurrence of any disaster or national calamity, affecting the community or a section of the community in the Federation;

111. Section 305(2).

- (f) there is any other public danger which clearly constitutes a threat to the existence of the Federation; or
- (g) the President receives a request to do so in accordance with the provisions of subsection (4) of this section.

The only case arising from a declaration of a state of emergency, pursuant to the provisions above, known to this writer, is *Plateau State of Nigeria & Anor v. Attorney-General of the Federation & Anor*.¹¹² The case unfortunately, was settled on a preliminary objection, not on the merits, and did not therefore address the critical issues arising from a declaration of a state of emergency. For that reason, all that can be said is that in two instances under the extant Constitution, more particularly, in Plateau and Ekiti States, a state of emergency has been experienced. The proclamation of emergency has resulted in the suspension from office of the Governor and Deputy-Governor. The State Houses of Assembly were also suspended. It is hoped that the courts will use the earliest opportunity to pronounce on whether it is lawful for elected office holders to be shoved aside at the President's say-so.

Conclusion

A brief attempt has been made to confront the implications which arise from the Constitutional provisions requiring the President and all State Governors to nominate an associate, who will run on the same ticket for the position of Vice-President or Deputy-Governor, as the case may be. It has been seen that without the nomination of an associate, no person can contest election either as President or Governor. Inevitably, once the contestant and his associate are successful, consequences of a legal and

112 (2006) All FWLR (pt. 305) 590.

Constitutional dimension must follow. As has been demonstrated, the executive team ticket may lead to a 'joint tenancy' or to a fatal crash or to a hostile separation. Certain events which have arisen as between the numerous Constitutional "twins" leave a very unsavoury tastes in our democratic experience. It is now notorious that the President has tangled with his Vice-President just as the Governors of Akwa-Ibom, Cross-River, Abia, Sokoto, Ekiti and Ebonyi States (to name a few) have had severe frictions with their Deputy-Governors at various stages of our recent Constitutional experiment. In the light of these and other fiascos arising from the polity, a lot of caution is required to enable our democratic practice take root. However, a note of warning may be sounded at this stage. That is, that as long as politics is promoted beyond legal and constitutional parameters, constitutionalism and indeed, the rule of law may inevitably be relegated to the background.

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